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THE NEW DEMOCRATIC
CONSTITUTIONS OF EUROPE

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THE NEW DEMOCRATIC CONSTITUTIONS OF EUROPE

A COMPARATIVE STUDY OF POST-
WAR EUROPEAN CONSTITUTIONS
WITH SPECIAL REFERENCE TO
GERMANY, CZECHOSLOVAKIA, PO-
LAND, FINLAND, THE KINGDOM OF
THE SERBS, CROATS & SLOVENES
AND THE BALTIC STATES

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INTRODUCTION

AS a result of the war 1914-18, two of the most important European States were convulsed by internal revolution. At the Peace Conference a general redistribution of territory was made; a number of entirely new States were created; others were so transformed by union with new lands or by loss of old possessions that it was difficult to say whether the identity of the former country remained or whether a new nation had been called into being. No other generation has witnessed the creation of so many States, the establishment of so many new Governments. To the student of political science and constitutional law the years immediately preceding and immediately following the conclusion of peace must be of absorbing interest. His theories of the nature and origin of the State can be tested by practical examples; he can see carried into effect, in all their variety and complexity, the most modern conceptions of the best form of government. The object of this study is to investigate these forms; to trace in them the influence of some general theory; to give expression to any new political ideas, produced by the necessity of devising solutions for unprecedented problems and difficulties; to inquire whether these problems have found an answer in any original practical contribution to the art of government. For this reason attention has been concentrated on a few important aspects by which it was hoped best to illustrate such new tendencies as may exist. No attempt has been made to embark on a systematic investigation of the general principles of constitutional law, or to enter on a detailed description of institutions which, although

they may be important in themselves, do not throw any light on new or original traits. The greater part of the book is necessarily descriptive and analytical; at the same time attention has been paid to the political conditions amid which these constitutions came into being, and, wherever possible, an account has been given of their practical application.

The Governments established immediately after the war in Germany and in the succession States of Russia and Austria-Hungary have been singled out for the purpose of comparison, because, in spite of obvious but, on the whole, superficial differences, they all have certain essential features in common. In all these countries, with the single exception of Hungary (which, for that reason, has been omitted), the form of government is democratic.

The interest of the new constitutions lies in the fact that an attempt has been made to give to the democratic principle its most complete and logical expression. Sovereignty rests with the people; the people are not only to control the Government, they are to be the direct holders of political power. Parliament is elected by the widest possible system of universal suffrage and by proportional representation. Nevertheless, the people do not surrender their authority to Parliament. The Representative Assembly is controlled by direct legislation or by a President who has considerable constitutional powers and is himself the direct representative of the sovereign people.

When, however, we come to examine the practical application of these constitutions we find that, even in the few years in which they have been in force, they have developed along lines which it was never intended that they should follow. The so-called checks upon the legislative absolutism of

Parliament have proved ineffective and unnecessary; in most cases the referendum and initiative remain a dead letter. The absolutism of Parliament has been avoided; power has fallen into the hands, not of Parliament, but of the political parties. The characteristic feature of the Governments of all these States is the weakness and instability of the executive.

This weakness is at least to a certain extent due to the fact that although Parliament can be controlled by outside authorities, nothing has been done to strengthen the position of the Cabinet as against the Representative Assembly. In most cases the Prime Minister has not been definitely entrusted with the right of demanding a dissolution. Whatever his constitutional powers, he does not make regular use of the right. The overthrow of a Ministry is not necessarily followed by a general election. The Cabinet has not the advantage of a direct mandate from the people. In some of these countries an attempt has been made to strengthen the executive through the medium of a strong Presidency. At the best such a policy can only serve to bolster up parliamentary government—it cannot make it work effectively. Even where the President has the real power of acting independently in opposition to Parliament, he has not been able to give stability to the Cabinet. In Poland, where the functions of the President have recently been considerably enlarged, there is a danger that the result may be, not the stabilization of democratic government, but its abolition in favour of a dictatorship.

Moreover, the framers of the new constitutions did not realize the impossibility of combining the English system of parliamentary government with proportional representation. In all these countries party strife is violent, and the number

of conflicting parties is large. The Government is formed by the coalition of a number of independent parties. If the coalition is wide and hostile groups are included, there is continual danger of internal disruption; it is almost impossible to adopt a creative policy; every measure, every act of Government must be submitted to each of the coalition parties for their approval. If the coalition is narrow the danger of dissension within the Cabinet is not so acute, the Government can adopt a more consistent line of policy: not having command of a majority in Parliament it is unable to enforce it.

This obvious danger of the weakness of the executive is one that the framers of the constitutions, in their anxiety to give expression to the democratic theory of popular sovereignty, entirely failed to forestall.

A further source of interest in these constitutions is to be found in the fact that, although democratic in form, they show abundant signs of the total reaction that has taken place against the individualistic Liberalism on which were based the democratic constitutions of the nineteenth century. The functions of government have been extended to include the supervision of the economic and industrial life of the nation. It is not difficult to tell from internal evidence alone that these constitutions are the result of a compromise between Liberal and Socialistic opinion.

One of the most difficult problems of democratic government is that of the reconciliation of individual interests with the general interest of the whole body of citizens. The tendency of modern political evolution is towards collectivism. The individual is expected to an ever greater extent to surrender his personal freedom to the common good of the community. This tendency to exalt the corporate body

above the members that compose it has not brought an unqualified accession of power to the State. It is characteristic of the materialization of modern life that it is not now Churches and religious bodies, but Trade Unions and other professional associations, that threaten the corporate unity of the State. Statesmen and political thinkers have often condemned such associations. The constitutions of the nineteenth century ignored their existence. In some of these new constitutions an attempt has been made to grapple with the difficulty and to find a recognized place for the partial organization of individuals within the common association of the State.

The general establishment of democratic forms of government immediately after the war was closely connected with the victory of the Allied Powers. The Allies, especially Great Britain, had always declared that they fought, not only for the protection of their own immediate interests, but for the realization of certain democratic ideals, with the safety of which the existence of a strong military autocracy in Central Europe was incompatible. This tendency was strengthened by the collapse of Russia and the entrance of America into the war. To many Englishmen and Americans the war was a struggle, not between nations or Governments, but between two conflicting systems, 'between the Kultur that stood for militarism, and the free democratic Ideal'; if the Allies were not victorious, democracy and freedom would become impossible. As a result, the establishment of democratic Governments in the defeated countries and in the new States was looked upon by the victors almost as a moral necessity. Imperialism and military autocracy had caused the war; Communism and the dictatorship of the proletariat had led to ruin and misery in Russia; representative democracy

remained as the only safe form of government. For the new States to deny belief in democracy would have been as impossible as to pour scorn upon the idea of a League of Nations, or openly to reject the principles of self-determination and the rights of small nations by virtue of which they had obtained their independence. The knowledge that the Allies would not make peace with the Imperial Governments of Germany and Austria gave an impetus to the revolutionary movement in the defeated countries, if it did not give rise to it. Whatever may have been their share in the origins of the revolution in these countries, the Allies afterwards used their influence as far as possible to keep that revolution within bounds, to check it at the point at which democracy had been attained, to prevent the triumph of the extremists and the dictatorship of the proletariat. Germany, and still more Austria, could, at the last extremity, rely on a certain relaxation of the terms imposed upon them as soon as it became apparent that further material distress would throw their people into the arms of the Communists. England and France feared Russian Bolshevism in 1918 even more than they had feared German Imperialism in 1914. The constitutions, which it is the object of this book to investigate, were established at the moment when faith in democracy had reached its highest point. Nevertheless, that faith had lost the freshness and enthusiasm of the early nineteenth century. Nineteenth-century Liberalism had looked upon representative democracy as a universal panacea by which might be cured all the evils of mankind: it was the only system by which good government could be made possible, a system to be applied to all countries and peoples irrespective of their history, character, and material condition. Half a century of practical experience in many European States and

in America brought a certain disillusionment. Democracy was still considered the best form of government, not because it is necessarily the most efficient, but because it is the most reasonable, the most humane, because it makes the highest demands upon the people. 'There is one thing better than good government, and that is government by the will of all.'

The complete failure of parliamentary government in Italy; the discontent it has aroused in other countries, the difficulties with which the practice of self-government has been faced in many of the new States, the steady pressure of socialistic opinion demanding, above all things, efficiency; all these have combined, since the establishment of these constitutions, to produce a rapid reaction against this belief in the absolute value of democracy. This reaction rests upon the growing conviction that a Government must be judged, not by the democratic nature of its origin, or the extent of its agreement with the will of the people, but by its practical achievement, by the extent of its actual service to the community, by the amount of well-being that it brings to the nation as a whole. The tyranny of the Fascisti in Italy arose from the practical necessity of establishing some effective form of government; it has become the centre of a new movement of political ideas. Democracy is no longer lauded as the only intelligent, the only possible way by which a civilized people can be governed; much is said to-day of the failure of democracy; the one attitude is as unwarranted as the other. Representative democracy is, and always has been, but one of many possible forms of government. This book will have achieved its purpose if it succeeds in showing that the failure of democracy, if, indeed, it has failed, is due less to the system itself than to the method by which it has been applied.

Even in those countries with which we are here concerned, countries in which the democratic principle has been accepted unchallenged, there can yet be traced an underlying distrust of representative government and parliamentary institutions. Democracy has been accepted, but the forms of democratic government have been called in question. The criticism directed against such institutions may often be just; the new constitutions may in certain cases supply solutions to problems which must be faced also in this country; it must, however, always be borne in mind that merely because institutions originally borrowed from England do not work satisfactorily among other nations, it does not of necessity follow that they are not the institutions best fitted to the character and needs of the English race. The English system of parliamentary government is not a clever device of the constitutional lawyer. It is a natural product of the English character, a character which combines impatience of authority with the capacity to produce and follow a chosen leader. This system does not work so well amongst other nations because they have different national characteristics. The Germans are more willing to obey the authority of a superior, less ready to follow the leadership of an equal. A political leader striving for personal eminence is looked upon with contempt; an official administering the law, with respect. The Slavonic races may, in the hour of national danger, be roused to the most heroic acts of patriotism, and may be animated by the most noble spirit of self-sacrifice; in times of peace they show themselves at once indifferent to public affairs and resentful of restraint. There is considerable danger that the failure on the Continent of an imperfect imitation of our constitution may react upon this country, and cause would-be reformers to look with dis-

favour upon a form of government that has served their country well; they may even be tempted to press for the ill-considered adoption of institutions which other nations, in despair at making the English system work amongst them, have devised out of their own genius—institutions which are probably as unsuited to our country as are ours to theirs.

PART I

THE ORIGINS OF THE CONSTITUTIONS

CHAPTER I

THE HISTORICAL BACKGROUND

‘IT often happens that a revolution which arises from war coincides with a failure of revolutionary energy.’¹ To a certain extent this is true of the revolutionary movement that swept through Europe in the autumn of 1918. That revolution was partly nationalist and partly social. It was a struggle for independence on the part of the subject races of Russia and Austria-Hungary; in the defeated States, in Germany, in Austria, and in Hungary, it was at one and the same time a political struggle to establish democracy and a class struggle to secure the emancipation and dictatorship of the proletariat. The remarkable fact about this political and social revolution is its moderation; in every instance, except that of Hungary, the moderate elements were successful in winning and maintaining power. The old order broke down before the destructive forces of war. A new order was established in its place; few people had wanted the change, fewer still had deliberately worked to achieve it.

This is particularly true of the internal revolution in Germany; a Socialist member of one of the first revolutionary Governments himself described it as a ‘revolution devoid of ideas’.² It was a revolution brought about by the collapse of the imperial militarist system, a revolution which no one

¹ Karl Kautsky, *Die Soziale Revolution*.

² Richard Müller, *Sozialismus oder Sozialisierung*.

but an infinitesimal minority of extremists had wanted, which the Majority Socialists, to whom it gave power, had until the last moment tried to prevent, and which after the event they strove to keep within reasonable bounds.

The revolution within the Austro-Hungarian Empire, 'the bourgeois nationalist revolution', as the Socialists call it, was due to a real conflict of interests between the authoritarian Habsburg State and the nationalist aspirations of the subject races. The war, the Russian revolution, and the defeat of the Central Powers gave to these peoples the opportunity to win their freedom; the desire for freedom was deeply rooted in the past. But since the revolutionary movement was primarily nationalist and not social, and since to achieve success it was dependent upon the goodwill and support of the Allied Powers, themselves opposed to the most violent forms of social revolution, the immediate result was the accession to power of the bourgeois democratic parties.

Similar considerations apply to the succession States of the former Russian Empire. The internal Russian revolution gave the opportunity for freedom. Had the moderate element triumphed in Russia it is possible that the Baltic provinces might have remained as self-governing units within the new democratic State. The aggressive policy of the Bolsheviks made such a solution impossible. The new States rejected the political forms both of the old Empire and of the new Bolshevik Republic.

During the struggle to win their freedom from Russia it seemed as though the Baltic peoples might turn to Germany for political guidance as well as for military assistance; this however was made impossible by the hostility of the native Letts, Estonians, and Lithuanians to the Baltic barons of German extraction and to the German authoritarian State

with whose help the Balts had hoped to set up a community, independent of Russia, but allied to Germany and organized with the object of giving power exclusively to the land-owning aristocracy; this hostility was the outcome both of racial antagonism and of the discontent aroused by social inequality.

In Finland the influence of Germany was yet stronger. German soldiers had helped to beat back the Bolshevik invasion; General Mannerheim, the hero of the war of liberation, was avowedly pro-German; the 'patriotic' anti-Russian officers had been trained in the German Army. The conservatives had hoped to establish a constitutional monarchy and had offered the crown to Prince Karl von Hesse. When he refused, General Mannerheim was chosen Reichsverweser. The victory of the Allies and the November revolution in Germany caused the defeat of the pro-German party. The Finns realized that in the future they could hope to maintain their independence only with the consent of the Allies. Nevertheless the conservatives, the Swedish and Finnish landed aristocracy, continued to advocate the German alliance, although in Germany their friends had lost power and they had nothing in common with the democratic socialist Republic. The Socialists who had taken sides with the Russian Bolsheviks against the national interest were discredited. The Liberal parties gained political power; they were anxious to establish friendly relations with the Allies, and partly for this reason set up a form of government calculated to win their approval.

The result of the revolutionary movement therefore was the establishment of democratic Governments throughout a considerable part of central and eastern Europe. Never before in the history of modern Europe had the democratic principle been so completely, so universally accepted.

This is the more remarkable since in Russia a revolution had taken place, which although finally brought about by the effects of the war had its origins not in outward circumstances, but in the internal conditions of the country, in the violent antagonism of different sections of the people and in the deliberate desire for change. The Bolshevik revolution was as fruitful of new political ideas as that of Germany was barren. It was directly opposed to the democratic ideology which has been generally accepted in Europe, and it was not without a struggle that democracy triumphed in 1918 and 1919 over the forces of the international Socialist revolution as propagated by the Russian Bolsheviks.

Two main ideas underlie the constitution of the Soviet Republic: the emancipation of the working classes by means of the communal ownership of the means of production, and the organization of the people in a gradation of councils,¹ chosen on a partly professional and partly territorial basis. Soldiers, peasants, and town workers are organized in separate Soviets which send delegates to regional and district congresses and thence to the all-Russian Congress of Peasants, Cossacks, and Red Army Deputies. At each stage the Soviet or Congress appoints an executive committee which is responsible for its actions to the full Soviet. The all-Russian Congress, consisting of delegates of the town soviets and regional congresses, is a large body of considerably more than a thousand members. It meets only once a year and delegates the greater part of its authority to an executive committee of three hundred members. The executive committee appoints the Council of Commissars of the people who are actually responsible for the administration. The soviets and congresses have each within their own sphere full legislative,

¹ Arts. 10, 11, 12, and Chaps. VI, X, and XI.

executive, and judicial powers; the members are delegates bound by a fixed mandate; they can be separately recalled at any time. The so-called unproductive professions are altogether excluded from political power.

The Bolsheviks argue that by ignoring social and economic distinctions the democratic constitutions have in fact brought about the tyranny of the non-labouring capitalist and bourgeois classes. They have, therefore, made it their object to abolish the exploitation of men by men, and to bring to an end the division of the people into classes. Ideally the Republic should consist only of labouring citizens, all serving equally in the work of production, all equally enjoying the fruits of material prosperity. That this end may be accomplished, all land and all the means of production are taken from the hands of individuals, and become the property of the Republic. During the transition period, when the division of the people into classes had not yet been abolished, it was considered necessary for the accomplishment of the aims of the Revolution to exclude from the exercise of political rights all who were not members of the labouring population. 'The establishment of a dictatorship of the urban and rural proletariat and of the poorest peasantry is necessary for the purpose of abolishing the exploitation of men by men and introducing Socialism, in which there shall be neither division into classes nor a state of autocracy.'¹ All persons who employ hired labour or receive an income such as interest on capital for which they do not work, all private merchants, monks, and clergy of all denominations, are disfranchised and have no rights as against the interests of the working-classes.² In effect the government is to be carried on by a section of the people and in the interests of

¹ Art. 9.

² Art. 65.

that section alone. The Bolsheviks have, however, not as yet been able to put their theory into practice. The limitations on the right to exercise political power are much greater than those provided for in the constitution; all opposition to the existing Government, whether on the part of labouring citizens or of the disfranchised classes, is ruthlessly suppressed. The Bolshevik revolution has brought about, not the dictatorship of the proletariat, but the dictatorship of the Communist party.

Nevertheless these ideas were not without influence in other countries, especially in the critical years immediately following the war. The Bolsheviks made every effort to spread their doctrine by propaganda, and where possible by force of arms. As at the time of the French Revolution, the desire to propagate an international revolutionary doctrine was made the excuse for national aggrandizement. The Bolsheviks invaded Poland and the Baltic lands, established the Soviet system for a short time in Finland and Estonia, and attempted by force to join these countries once more to the Russian State from which they had freed themselves in the early days of the revolution. The rejection of the Bolshevik system in these countries became part of the struggle for national independence. In Germany, Austria, and Hungary the outbreak of the revolution was to a certain extent due to Russian influence. In Hungary the Soviet system was established in its extreme form for a short period and was followed by an equally violent reaction.

In Austria the extreme element never gained the upper hand. The revolution was fought and won by the Social Democrats. Soldiers' and Workers' Councils sprang up spontaneously; afterwards they were organized on a uniform basis by a central or national conference of representatives of the

Councils. It was impossible for the Government to take any step without conciliating the workers and winning their approval, but within the workers' associations, the Councils and Trade Unions, the Majority Socialists triumphed over the Communists. At the instigation of the Social Democrats the German members of the Imperial Diet had followed the example of the Czechs and Yugoslavs and formed themselves into a Provisional National Council, the first representative assembly of the new State of Austria. The Workers' and Soldiers' Councils were never the actual holders of political authority; by their own wish the continuity of the representative assembly was maintained; the bourgeois and capitalist classes lost influence, but they were never disfranchised. When the Constituent Assembly was elected in the spring of 1919 the Social Democrats had not an absolute majority. A Coalition Government was formed of Social Democrats and Christian Socialists. The Christian Socialists represented both the radical peasantry and the counter-revolutionary urban bourgeoisie. The constitution was the result of a compromise between these parties.¹

In Germany the revolution was carried through by the extremists. The Social Democrats had been willing to join with the Liberal bourgeois parties in the gradual democratization of the State. The Emperor had already granted responsible government and had called the Social Democrats to office, when the Socialist revolution was brought about by risings in Kiel, in the North German cities, and finally in Berlin. The revolution was partly an outbreak of despair due to the military collapse and to the material distress of the people, and partly the result of deliberate propaganda carried on by Russia through the medium of the Spartacists,

¹ Dr. Otto Bauer, *Die österreichische Revolution*.

the extreme left wing of the German Socialists. Soldiers' and Workmen's Councils were established on the Russian model, but from the very first the fruits of victory began to pass from the extremists to the more moderate Socialists. The first revolutionary Government consisted equally of Majority Socialists and Independents. The Spartacists refused to co-operate at all with the Majority Socialists; the Independents only consented to do so on condition that none but Socialists were admitted to the Government, and that the Soldiers' and Workers' Councils were recognized as the sole source of political power. This attempt to establish the rule of the Councils and the dictatorship of the proletariat in Germany proved a lamentable failure. The bulk of the working-classes themselves were opposed to it; the Communist leaders afterwards admitted that in the November revolution in Germany 'there was no really strong desire among the masses for the creation of Workers' Councils'.¹ When the first all-German Congress of Soldiers' and Workers' Councils met in Berlin it voted by an overwhelming majority for a Constituent Assembly to be elected immediately by universal suffrage. Thereby, according to the Spartacists, it 'set the stone on the grave of the revolution'.²

When the Assembly met, although the Social Democrats had a larger number of representatives than any other one party, they were in a minority as against the combined 'bourgeois parties'. A coalition was formed of Majority Socialists, Democrats, and the Centre Party. The democratic principle was almost unanimously accepted as the basis of the new constitution. Only a small number of Independents continued to clamour for the Councils' system

¹ Carl Radek, *Die Entwicklung der Weltrevolution*.

² *Die Rote Fabne*, quoted in Noske, *Von Kiel bis Kapp*.

and the dictatorship of the proletariat.¹ The Nationalists and People's party, who would have advocated a constitutional monarchy, realized that under the circumstances such a solution would be impossible. They preferred to exert their influence on the formation of the new Republican Constitution rather than to take up a position of useless and intransigent opposition. The work of drawing up the constitution was given to a Democrat, the Minister of the Interior, Professor Preuss. His first draft was a pure product of Democratic Liberalism.

The moderate attitude of the German and Austrian Social Democratic parties, more than any other one cause, is accountable for the fact that, except for spasmodic outbreaks, the class war was not carried beyond the borders of Russia, and that the dictatorship of the proletariat was repudiated in Central Europe. Germany was the danger point in 1918, and it was on Germany that the Bolsheviks at that time concentrated their propaganda. The German Social Democratic party, 'the greatest obstacle in the world to the revolution',² realized the difference between the conditions of their country and those of Russia. Unlike the degenerate, unenterprising, politically inexperienced middle class of Russia, the German bourgeoisie were efficient, vigorous, and numerically strong. The dictatorship of the proletariat, even if desirable, could be obtained only as the result of prolonged and bloody civil war and could be maintained only by force. The peasantry, who in Russia had been won to the side of the Bolsheviks by the division of the large estates, were conservative and apathetic. In Austria their individualism proved an insurmountable

¹ The Spartacists had altogether refused to take part in the elections and were, therefore, not represented.

² Carl Radek, *Die Entwicklung der Weltrevolution*.

obstacle to the dictatorship of the proletariat of Vienna. The Social Democrats, therefore, in their own interests and in those of their country, concentrated their efforts on checking rather than encouraging the class war.

The agricultural countries of Eastern Europe were, owing to their proximity to Russia, liable to invasion from that country, but apart from this there was no inherent danger of violent social upheaval, as was the case in industrial Germany. In these countries the peasants played a much more important part; the new Governments followed the example of the Russian Bolsheviks and won their support by the immediate division of the large estates.

The progress of the revolution in Central Europe was accompanied by an ever-growing hostility between the different sections of Socialism. The Majority Socialists, the 'Reformists', advised co-operation with the Liberal bourgeois parties in the creation of the new Democratic State. Democracy would give political power to the working-classes and make possible the peaceful introduction of Socialism. The Centralists—the German Independent Socialists and the Austrian left wing¹—had been originally divided from the main party by their pacific attitude and by opposition to the war policy of the Majority Socialists. Their internal policy was somewhat ill-defined. They were opposed to violence and to the establishment of the dictatorship of the proletariat by force, but they thought that a system of Councils should be established to supplement the Representative Assembly; they would have deferred the election of the Constituent Assembly until the 'dearly bought fruits of the revolution' had been secured and the first steps taken towards the socialization of industry; they condemned the 'militarist' policy of the Majority

¹ e.g. Haase, Kautsky, and Eisner in Germany, Otto Braun in Austria.

Socialists and declared that they had betrayed the revolution by maintaining in power the officers and officials of the old régime. The more extreme wing of the German Independents¹ really differed very little from the Spartacists; they maintained that the Council system could not be combined with representative parliamentary government. The interests of the working-classes could only be secured by the establishment of Soldiers' and Workers' Councils with full political power. The Spartacists and the Austrian Communist party were in direct communication with Russia. To them a compromise such as the Centralists had wanted was impossible. 'There is no middle path between the dictatorship of the proletariat and the dictatorship of the bourgeoisie.' The bourgeoisie would never submit peacefully; they must be suppressed by force.

In this internecine struggle the Reformists proved triumphant, but in the course of the struggle the division between the Majority Socialists and the Communists became much more marked than that between the Majority Socialists and the Democrats. There resulted from this a gradual shifting of power from the Majority Socialists to the Liberal parties, not because the former betrayed a revolution which they had never wanted, but because the intransigent element compelled them, if anarchy was to be avoided, to turn for support to the middle classes.

The tendency in all revolutions is for power to pass from the more moderate to the more extreme element. The greater the distress of the people, the greater the material difficulties by which the Government is faced, the more unlikely will it be that the moderate party will be able to maintain itself in power. The explanation of the fact that the

¹ e.g. Ledebour and Daumig.

Majority Socialists were able to do so in Germany, although the difficulties that inevitably beset a revolutionary Government were there accentuated by the after effects of war, is to be found in two main causes. They had control of the greatest working-class organizations, the Social Democratic Party and the Trade Unions, and they were able to make use of the technical knowledge and experience of the officials and officers of the old régime who put their services at the disposal of the new Republic.¹ Moreover, although moderate in their aims, they showed themselves resourceful, determined, almost ruthless in asserting their authority.

The failure of the moderate elements in Hungary to check the onward course of the revolution presents a striking contrast to their success in Germany and Austria. The circumstances were less advantageous, and the Liberal Government under Karoly showed less ability and energy in establishing their own authority than did the Socialists in Germany. They did not win the support of the peasants by the division of the large estates, no reliable armed force was created, there was a complete lack of honest and able men to carry on the work of the Government departments. The Government had neither officials to administer its policy nor soldiers to enforce it. The uneducated, unorganized industrial proletariat could not be consulted or controlled through the machinery of political party or Trade Union. It fell an easy prey to Bolshevik propaganda.

The German Majority Socialists proved themselves eminently successful in the actual work of government, in maintaining law and order during the revolutionary period. Their lack of creative policy has exposed them, not without a semblance of justification, to the attacks not only of the

¹ Noske, *Von Kiel bis Kapp*; Maerker, *Vom Kaiserbeer zur Reichswehr*.

left wing, but of many moderate Socialists, who hoped that the political triumph would be immediately followed by the abolition of the capitalist system. For the first months of the revolution the Socialists were alone in power; afterwards they played the preponderating part in the Weimar Coalition. Political power was in their hands, the capitalist organization of industry had been shaken to the very roots, yet no serious effort was made to carry through the socialization of industry which for years had been the main feature of their programme. This failure to achieve the main object of their policy was partly due to the divisions amongst the Socialists themselves, still more to the fact that they had no positive programme; the revolution had taken them by surprise; they had no scheme ready by which socialization could be accomplished. As disciples of Marx they had believed that the necessity for socialization would grow inevitably from the development of the capitalist system, as 'Reformists' they had hoped that the change would take place gradually without any sudden revolutionary upheaval. The commission established in December 1918 to inquire into the question came to the rather ambiguous conclusion that the existing system of private enterprise must be retained, at least for the time being, in order to restore production and trade. The wholesale socialization of the means of production was condemned. Gradual advances might be made in those industries that were 'ripe' for socialization. Coal and iron were especially singled out, as it was thought that these highly monopolized industries could be transferred to communal ownership at the expense of but slight dislocation.

The Socialist Government may have been lacking in creative policy, but it showed a just appreciation of the realities of the situation by which it was faced. Germany

was starving, her industries had been shattered by the war, raw materials were lacking, machines were defective. Theoreticians and professors might devise schemes of socialization, those who had the responsibility of government could not afford to experiment: 'a complicated industrial system cannot be as easily changed as a political constitution.'¹ Such a change must be carefully considered and take place slowly if a diminution of output is to be avoided; such a diminution is the direct opposite of the object of socialization, which is to obtain a more fair distribution of wealth combined with increased output.

The left wing held the same view as to the necessity of increased productivity, but not having the immediate responsibility of introducing the change, they took a more optimistic view and claimed that socialization, the organization of industry on a systematic scientific plan, must inevitably lead to an increase in the production of real wealth.

In the meantime, whilst the Government was occupied primarily with political questions, German industry had found its own salvation. In November 1918 the first Industrial Alliances were formed between the Trade Unions and Employers' Associations of the chief German industries. In December of the same year these new associations joined in a central alliance which has since been considerably extended. The principle of parity was recognized as the basis of the organization of each industry and of the central alliance; employers and employees were equally represented. Legien, the general Trade Union secretary, has called the Industrial Alliances the 'Magna Carta of the German Trade Unions'. The employers for the first time officially recognized the Trade Unions as the appointed representatives of the workers;

¹ Richard Müller, *op. cit.*

they admitted the unlimited right of the workers to combine and accepted the principle of an eight hours' day; wage contracts were to be concluded in all the industries concerned, joint and equal arbitration boards were to be established.

The advantages to the employers were even greater. The workers' associations had demanded a share in the regulation of industry; this they had obtained. By coming to an agreement with the employers, by accepting the parity principle as the basis of the new industrial organization, they gave a new lease of life to the existing system of private ownership. Capitalism was to be controlled, not abolished. The Trade Union leaders were as frightened as were the politicians of destructive socialization on the Russian model. If the workers suddenly took over the conduct of industry, catastrophe would be the result. The technical knowledge and experience of the capitalist entrepreneur must be enlisted in the work of reconstruction.

The moderate policy of the Trade Union leaders roused the most violent opposition on the part of the extreme Socialists. The bureaucrats of the Trade Unions, they said, were interested only in preserving the organizations which gave them their salaries and their positions. They would engage in isolated skirmishes to obtain improved conditions of hours and wages, but they had renounced their faith in the class war; they had forgotten that real improvement would be impossible until the workman was made master of the means of production and finally freed from the exploitation of the capitalist. Any attempt at conciliation between capital and labour was a betrayal of the working-classes; socialization meant the complete abolition of the employing class, not an alliance between employers and workers. The

attitude of the extremists to the Trade Union leaders was one of intense bitterness. Richard Müller, an independent Socialist, wrote of Legien, 'He is my enemy, the object of my bitterest hatred, worse even than the bourgeois enemy . . . so long as Legien and the Trade Unions are the creatures of formal democracy, so long as they are the creatures of the Industrial Alliances, even so long will the revolutionary proletariat refuse to fight side by side with Legien.'

The Spartacists and the left wing of the Independents showed their opposition to the political and industrial policy of the Majority Socialists by the organization of strikes and riots. They did not stop short of armed resistance. Noske, with the help of the volunteer army, sternly suppressed these disorders, but after the serious outbreak of March 1919 the Government felt bound to make some concessions. In spite of the fact that the Socialists and representatives of the Nationalists and People's Party had all advocated the special representation of industry and of industrial organizations in the Constitution, Preuss had not long before declared in the National Assembly 'that there exist such weighty objections to the idea of Functional Representation . . . that it does not seem at all probable that it will be realized in the constitution',¹ and shortly afterwards the Government had made an official statement to the effect that the Councils would not in any form be included in the constitution. The introduction of the economic clauses, the so-called 'anchorage of the Councils' in the constitution, was therefore due to the direct action of certain sections of the working-classes. The Government was attacked by some of its own supporters for having acted at the dictation of the mob. The economic clauses,

¹ Session 4 March 1919, Heilfron, *Die deutsche Nationalversammlung im Jahre 1919*, p. 1119.

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however, fell far short of the desires of the extremists and met with general approval in the Assembly.

These clauses were drawn up, not by Preuss, but by Sinzheimer, the Minister of Economic Affairs. They formed the model for the economic provisions of the other new constitutions. In Yugoslavia the original draft contained no such provisions; these were added on the demand of the Socialist and Peasants' parties. They form a comprehensive section of the constitution, and owe their inspiration largely to the example of Germany.

The bitterness of the extreme Socialists is from their point of view not unnatural. The first step in the world revolution has been followed by the rapid development of organized capitalism and by the introduction in the greater part of Europe of democratic constitutions based on the Liberal principles to which that revolution was most violently opposed. Nevertheless the achievement of the moderate Socialists is not as slight as might at first sight appear. Individualism as a principle of government has finally been discredited. It is not too much to say that, measured by the standard of a hundred years ago, all parties to-day are Socialistic.

CHAPTER II

THE POLITICAL THEORY OF THE NEW CONSTITUTIONS

IN all the new constitutions with which we are concerned we see the working out to its logical conclusion of the classic Liberalism of the nineteenth century. In the practical application of that Liberalism, these countries have looked to England as an example, for, in spite of a certain contempt for our lack of idealism and intellectual understanding of our own institutions, England has always appeared to continental countries as the true home of democracy. This tendency is strengthened at the present time by a widespread distrust of the French system and by the desire to avoid the particular form of parliamentary government that has developed in that country. To many continental constitutional writers, both French and German, England has seemed the perfect model to be imitated and France the bad example to be avoided. To imitate the institutions of another nation is, however, a difficult and often an unprofitable labour. Slavishly to adopt in every detail the governmental system of another country is obviously difficult, since conditions are not everywhere the same. To accept from another country what seems good and to reject what is bad is even less possible of achievement, since the good and the bad are often inseparably connected and may stand to each other in the relation of cause and effect. The attempt, as we shall see hereafter, to adopt the actual form of government practised in this country has been fraught with only limited success, owing partly to lack of comprehension of our institutions and partly to the im-

possibility of making these institutions work effectively in countries where conditions are very different.

When Montesquieu propounded the doctrine of the separation of powers, he thought that he was giving expression to the underlying principle of English freedom. When the Americans established a form of government in which the executive and legislative powers are entirely separate and independent, they believed that they were taking from the English Constitution the essential principles on which it was based, and rejecting the incidental abuses by which it had been vitiated. In reality they had failed to understand the real working of that constitution. By making it impossible for any member of the legislative body to take part in the executive, they cut themselves off from the characteristic development of English democracy, which depends upon the concentration of all the powers of State in one single elected authority and upon the bringing into harmony of the legislative and executive powers.

No form of government is entirely stable; it changes or is adapted by the method of its application to meet the needs of each succeeding generation. This is especially true of the English Constitution: it is not contained in any one specified document; no distinction is made between ordinary and constitutional laws; the constitution is easily changed; it does not hamper the aspirations of the people, but expands with them. This constitutes its real strength, and herein also lies the difficulty of its imitation in other countries. In applying the constitution of this country to their own nations, foreign statesmen tend to adopt institutions not in the form in which they are actually working, but as they have been described by constitutional writers of a previous generation.

The chief contribution of English constitutional law to

foreign States during the nineteenth and twentieth centuries has been the system of Cabinet government. Every attempt to define by the laying down of hard and fast rules a system depending so much upon custom and expedience has, however, shown the almost insurmountable difficulty of imitating at any one point in its development a form of government that is changing almost from day to day. The French Constitution of 1875, which was the model for many other continental countries, centred all the forces of State, both legislative and executive, in the popular Representative Assembly, although in England at the time the substance of power was already passing from Parliament into the hands of the Cabinet. The new constitutions have attempted to remedy the defects of the French system; they have done so by devising checks upon the power of Parliament and by strengthening the position of the head of the State as an independent partner in executive authority. This is especially true of Germany; in effect the German conception of Cabinet government is of a system similar to that in force in this country at the end of the eighteenth century.

Foreign constitutional writers have not realized that the strength of the English system depends upon the fact that power is being focused more and more in the Cabinet and in the Prime Minister. The position of Parliament is certainly less important than it was; merely to weaken Parliament by external intervention, however, will not strengthen the Government. The virtue of the English system is that by making the Prime Minister the direct choice of the people it has solved the problem of combining popular control with efficiency of government. Anything more opposed to the system of checks and balances at present so popular on the Continent it is difficult to conceive.

To adopt a theory, a principle, a general line of thought is easy and perhaps more prudent. For the theory on which they are based the new constitutions have turned to France, to Rousseau and the democratic ideas first expounded during the French Revolution. The object of that theory is to strengthen the State so that it may give expression to the sense of national unity, may guard and maintain the common welfare, prevent the strife of individuals, and at the same time pay regard to the separate rights of every member of the State, and make impossible the abuse of power by a governing authority, seeking its own interests and not those of the community. For Hobbes's theory of the absolute power of State vested in the sovereign body by the contract of submission, and for Locke's theory of the double contract between the individuals to form the corporate body of the State and between the community and the Government, is substituted Rousseau's idea of a single contract by which every individual surrenders himself to the community as a whole. The State is conceived as a free association of individuals; every citizen is a separate isolated unit equal with every other unit and subordinate only to the common association. In forming the contract the people do not resign their sovereign right: sovereignty remains with the whole body of citizens; it finds expression in the general will of the people; the establishment of a form of government means only that an organ is appointed with a duty to perform; the trust is revocable at any time.

This theory was further developed by Sieyès.¹ He also insists on the ultimate sovereignty of the whole people and the necessity of the common will for the existence of the State, but he denies Rousseau's contention that the general

¹ Sieyès, *Qu'est-ce que Le Tiers État ?* (especially Chap. V).

will cannot be represented, that as soon as a people adopts representation 'it is no longer free, it no longer exists'. Sieyès's original contribution to modern political thought consists in a theoretic justification of representative government, which is the practical solution necessary for the application of Rousseau's doctrine to conditions different from those of the Swiss and classical models that he had in view. These theories, first expounded during the era of the French Revolution, form the basis of all the democratic constitutions of the nineteenth and twentieth centuries.

The constitutions of the nineteenth century owe more directly to Sieyès than to Rousseau. Admiration of the representative system became universal. Sieyès himself had looked upon it not merely as a necessary solution to be adopted when the members of the association become too numerous and too widely dispersed themselves to exercise the common will; he considered it as a positive good from which were to be derived all the benefits of an ideal form of government.¹ His defence of the representative system was afterwards taken up by the English Liberals and Utilitarians, who hailed it as the 'grand discovery' by which alone good government could be made possible.²

Sieyès himself was a supporter of indirect election, since he thought it would lead to the return of able men who should act as the leaders rather than the servants of the people. By its means and in other ways he sought to establish for the Representative Assembly an independent and authoritative position; with the same end in view he excluded the possibility of binding instructions issued by the electors. The ultimate authority of the sovereign people would

¹ T. H. Clapham, *The Abbé Sieyès*, pp. 28 et seq.

² Leslie Stephen, *English Utilitarians*, vols. i and ii.

be maintained by the provision that changes in the fundamental, i. e. constitutional, law could be made only by a special representative body chosen for that purpose; the ordinary Assembly must always be bound by the original agreement in virtue of which it existed; direct legislation he looked upon with abhorrence; the general will was far more truly expressed by the decisions of chosen representatives than by a vote of the crowd. In virtue of these theories the constitutions of the nineteenth century tend to give great power to a Parliament supposed to represent the general will and to exercise the authority of a sovereign people. The position of the deputy is independent; he is bound by no instructions, he cannot be recalled by his constituents, the period of the parliamentary mandate is often long, no room is allowed for direct legislation; in most cases there is an upper house, the members of which are chosen by indirect election.

Modern statesmen have, perhaps unintentionally, reverted more exactly to Rousseau's original meaning; the conception of popular sovereignty which underlies the new constitutions is more akin to that expounded by Rousseau himself than to the Liberal ideas on which were founded the constitutions of the nineteenth century. Sovereignty cannot be delegated; it remains with the whole body of citizens; the people as far as possible are to take a direct part in the work of government; by universal suffrage and proportional representation Parliament is made to represent as exactly as possible the wishes of the nation; nevertheless Parliament is not sovereign; it is only one of the organs that can be established, it is by no means the only one of those organs. Through almost all the new constitutions we can trace this tendency of distrust in representative government. Reacting against the unlimited

power of Parliament, modern statesmen have sought a more adequate means of giving expression to the will of a sovereign people. No simple method being apparent, they have tended to establish a system of checks and balances; the people are given the means of controlling Parliament by direct legislation; or an independent authority, such as an elected president, is set up as a counterpoise to the representative assembly. In spite therefore of the admiration of foreign nations for the constitution of this country and the almost universal desire to avoid a form of government similar to that of France, the new constitutions, as did those of the nineteenth century, owe their inspiration to French thought more than to English.

In a certain sense these constitutions show a singular lack of originality or invention. They have borrowed their theory from France and in some of its most important aspects have sought to apply it in the method of England. Certain institutions, the referendum and initiative which seemed to give perfect expression to the theory already adopted, have been imitated from Switzerland. An attitude of mind—a certain distrust of appointed authority; the desire at all costs to avoid responsibility; the theory that the Government should not create policy and lead and educate the opinion of the nation, but that it should follow the wishes and wait upon the decisions of the people—has been justified by the example of America. Except perhaps in Finland, which has borrowed freely from the indigenous institutions of Sweden, we find no case of natural constitutional development. These countries have no constitutional history, their form of government is academic. It has been based on the general democratic theory universally accepted on the Continent, and has little or no connexion with the history or with the

peculiar conditions of the particular countries concerned. This is due to the fact that popular government has been adopted late, when the principle and theory of democracy were already established, and suddenly, after a revolutionary change enabling the new State to apply this theory in its complete form and work it out logically in every detail. England has been the workshop and the forge for forms of popular government, because in this country democracy developed early and it developed slowly, enabling each new practical necessity to be answered by a corresponding practical invention. The same thing is true of Switzerland, where a gradual and natural development led to the growth of an original machinery of democratic government. France has been the home of democratic theory because there popular government was established suddenly, after a revolutionary change, but at a time when most countries were still governed by the authority of a more or less absolute ruler. France, turning to the example of the two great existing democracies, did not slavishly imitate their constitutions, but sought a justification and reasonable explanation for their form of government; in going below the actual forms of their institutions and seeking a philosophical explanation for what England and America had done in practice she invented the democratic theory that has been accepted unchanged to the present time. What must be looked for in the new constitutions, therefore, is neither the development of a new theory, nor the invention of new forms of government, but a new application of existing forms to give complete expression to an already accepted theory.

It is not, however, just to lay emphasis only on the poverty of ideas shown by the new constitutions. At the very time when the democratic theory is being almost universally

accepted and an attempt is being made to apply it in its most perfect form, we can already trace the beginning of a reaction against that theory. This reaction has had only a slight practical effect, as far at least as the actual form of the constitutions is concerned, but this practical influence is the outcome of a movement showing great wealth and variety of original ideas, and likely to be fruitful of many interesting and valuable contributions to political theory in the future.

The object of the State as it was understood at the beginning of the nineteenth century was to secure to every individual the largest degree of personal liberty that was compatible with the freedom of every other citizen. The State must be responsible for life, property, security, justice, and national defence. The Government must play the part of the 'watcher in the night'. It must on no account interfere with the freedom of action of any individual as regards his private life, his profession, or his means of subsistence; such interference, however benevolent in its intention, would be fatal to the prosperity of the individual and of the nation.

As far as the policy of Governments is concerned, the reaction against this theory began early. State education, public health administration, State control of the conditions of labour, each in turn was a practical challenge to the theory that the interest of all is best secured by encouraging each individual freely to pursue his own material advantage. On the Continent the individualistic theory was never so strong as in this country, and there also the functions and duties of government, owing partly to the development of Socialistic ideas, and partly to the ever-growing complexity of modern life, are increasing with great rapidity. The object of the State is not now considered to begin and end with the pro-

tection of the life, liberty, and property of the subject; the object of the State is service, to secure to every individual the means of an adequate livelihood, to develop the resources of the country to their fullest extent, to give to every citizen the greatest possible degree of physical and moral well-being.

The democratic constitutions were admirably fitted to perform the limited functions for which they existed, but as soon as the State is expected to provide for the individual the means of material well-being, as soon as the economic and industrial life of the nation is withdrawn from the sphere of individual enterprise and comes under the jurisdiction of the State, a far greater degree of technical knowledge and efficiency is necessary on the part of the Government. The new conception of the object of the State is in no way incompatible with Rousseau's doctrine of popular sovereignty. It need affect only the extent to which the individual surrenders himself to the community, and the nature of the services that he expects in return. Where the constitutions of the nineteenth century speak only of the rights of citizens which it is the function of the State to protect, those of the twentieth century prescribe duties which he must perform in return for benefits due to him at the hands of the community. The fundamental conception of popular sovereignty remains, but the kind of institution that was established as a result of the democratic theory is considered by many as entirely incapable of performing the functions for which a modern Government exists.

The burden of attack falls upon that part of Rousseau's theory which insists on the isolation of the citizens, their conception as separate units that must not be allowed to join in any association but the common association of the State. Universal suffrage, the root principle of democratic govern-

ment, means in fact not the rule of a sovereign people, but the tyranny of the majority.¹ Rousseau's theory of the general will when applied to the details of government becomes a fiction; opinions differ as widely as interests; interests may be disguised, opinions remain naked in their antagonism. 'Nothing is more easy than to prove the sovereignty of a unanimous nation, nothing is more difficult than to prove therefrom the sovereignty of the majority.'² The English individualists sought a remedy against the tyranny of the majority by limiting the functions of the State and insisting on the individual rights and liberties of the subject. If the functions of government are to be extended to every sphere of life, the rule of the majority may indeed become a burden.

It is argued, moreover, that the voice of the individual cannot make itself heard unless an intermediary body is introduced between the single isolated citizen and the community as a whole. Formal democracy has found its own remedy in the organization of political parties. These parties are, it is said, as artificial in their origin as they are useless for the achievement of good government. Their members may differ on many essential points; they may have different interests and belong to different professions; they are joined by a momentary adherence to some high-sounding programme, and are won by persuasion and cajolery to give power to the professional politician who governs without real comprehension of the needs of the people and with the desire for his own advancement as his ruling passion, tempered only by fear of the periodical judgement of the ballot-box. A further proof of the failure of democracy is found in the argument that all

¹ e.g. Dr. Edgar Tartarin-Tarnheyden, *Die Berufsstände, ihre Stellung im Staatsrecht und die deutsche Wirtschaftsverfassung*, pp. 99-113.

² Simonde de Sismondi, *Études sur les constitutions des peuples libres*.

that is valuable or creative in the work of government is done by the permanent officials in the Government departments and not by the popular representatives in Parliament.

Particularly in Germany, where the defects of the party system seemed most apparent, students of political theory have for years been groping after some solution of the difficulty, and tentative efforts are being made to devise new forms of government, which shall at once be more efficient and give more opportunity for the direct participation of the people in the management of their affairs.¹

Old theories of functional representation have obtained new life and meaning. It is argued that the individual is more truly represented by a person of his own profession, who shares his interests and understands his difficulties, than by a party politician who puts before him all kinds of general principles, having little connexion with the practical problems of existence with which he is faced. The people will never be truly represented unless they are organized in *Berufstände*, and every *Berufstand* is given a voice in accordance not with its numerical size, but with the importance of the part that it plays in the life of the State. Proportional representation may secure a hearing to the political opinions of minorities; opinions are of no account as against interests. These interests must be organized and won to the service of the State or they will organize themselves and secure their own ends at the expense of the community.

A new system of representation, however, was not, by many, considered sufficient to secure to the people that direct exercise of their sovereign rights which the contrivances of formal democracy had made impossible. The Russian experiment seemed to suggest the possibility of a form of govern-

¹ H. Herrfahrt, *Das Problem der berufständischen Vertretung*.

ment which would break down the gulf between the ruler and the subject.

‘There has arisen in the minds of the people an urgent desire that popular sovereignty, which, caught in the trammels of party intrigue, had become a mere form, should once again be a real force. The individual is determined to take an active part in the exercise of sovereignty. This desire felt by a large section of the people for a real participation in the State has culminated in the idea of a Councils system.’¹

The advantage of such a Council system is that it allows at some point the direct participation of every individual. The members of each Council are the real representatives of their electors and can be recalled by them at any moment.

A study of the Soviet Republic is outside the sphere of this book. It is so entirely different in form and principle from the democratic constitutions established in other countries after the war that it must be left for separate consideration. With Russia we are concerned only in so far as she had influence on the final form of the constitutions of other States. Outside the ranks of Socialism thinkers were not lacking with clearness of vision enough to separate the abuses of the Russian Revolution from what might be suggestive in her constitutional experiment; they realized that the Council system, if freed from its incidental abuses, might provide a new and valuable machinery for the organization of democracy. Moreover, it was easy to turn to the example of indigenous German thought. Nineteenth-century Liberalism had looked upon the State as a purely rational contrivance; the social contract was not, and was not necessarily intended to be, a historic fact. ‘Sound politics is not the science of what is, but of what should be.’² German statesmen and

¹ Tartarin-Tarnheyden, *op. cit.*, p. 3.

² Clapham, *op. cit.*

thinkers had always tended to give adherence to a very different theory, a theory which looked upon the State as an organic whole formed by the union in one large association of a number of smaller groups; they sought to find the true nature of the State in its historical development.

Althusius already had taught that the State was in fact built up by the union under one Government of pre-existing local associations, these associations being themselves formed by the union of yet smaller groups.¹ The existence of such associations was not antagonistic to the formation of the State; it was the condition by which it was made possible. It is argued that such a conception is the only one by which the sovereignty of the people can be carried into effect. Intermediary bodies must be introduced between the individual and the State; through these intermediary bodies the connexion can be maintained between the individual will and the decisions of a governing authority. Althusius's idea was of an organic body built up on a purely territorial basis.² To the territorial tie we have only to add that of profession, and we have in its perfect form the modern idea of a State organized by the union in one body of pre-existing territorial and professional associations.

The election of the political Parliament, the final source of authority in the State, on the basis of any form of functional representation, is not at present a practical possibility. It is entirely opposed to the Liberal idea according to which the sovereign people elects an assembly to express their will, every deputy representing not his own constituents but the nation as a whole. Moreover, even if Liberal opinion could be overridden and such an assembly established it would be

¹ Gierke, *Joh. Althusius*, 1883, pp. 21 et seq.

² Gierke, *op. cit.*, p. 244.

a question of almost insurmountable difficulty to arrange how decisions should be taken. It is not likely that agreement or compromise could always be arrived at amongst such conflicting interests; in the end the majority principle, which it is the object of functional representation to avoid, must be resorted to. In this case endless difficulties would arise as to the weight of representation to be given to each particular interest. This does not mean that a functional chamber may not play a valuable part in enabling the political Parliament to examine a question from every point of view, and finally to arrive at a decision which shall as far as possible be in conformity with the good of all.

The idea of such an advisory council is not new. German statesmen from Stein¹ to Bismarck had insisted on the necessity for a reasoned non-partisan consideration of important legislative measures. Bismarck² proposed, and indeed established in Prussia, an Economic Council as the only means by which Parliament and the Government could keep themselves permanently in touch with the industrial life of the nation. 'It is impossible³ that every separate *Member of Parliament* should study each question so thoroughly that he will not be glad to have definite information put before him by an expert.' The Germans have always looked with a certain tolerant contempt upon parliamentary institutions, upon the government of amateurs; the Economic Council supplies a long-felt want in the form of a highly specialized body able to speak with authority on all questions of technical difficulty and capable of expressing the interests, difficulties, and desires of every section of the people. The need for such a body is not unfelt in other countries; several of the new

¹ Herrfahrt, *op. cit.*, p. 41.

² Herrfahrt, *op. cit.*, pp. 58-83.

³ Tartarin-Tarnheyden, *op. cit.*, p. 87, also pp. 84-95.

constitutions have imitated Germany in this respect. In England¹ also the growing complexity and difficulty of the problems that must be faced have taught Parliament and the Government more and more to realize their own shortcomings and to turn for information and advice to specially appointed Commissions. The establishment of a permanent Economic Council would make these inquiries *ad hoc* unnecessary in the future. Parliament, instead of seeking information only when some difficulty had arisen or when an industrial crisis made the intervention of the Government essential, could keep itself continuously informed of the conditions of all important industries.

The statesmen of 1919 were successful where Bismarck had failed, not only because opinion had advanced, but because conditions had changed. The war has served in all countries to push economic considerations into the foreground. This is especially the case in Germany; she emerged from the war with shattered industries, with the national finances in a state of chaos, and ruin staring her in the face unless an immediate and successful attempt could be made to revive the industrial life of the nation. All parties were agreed that industry must be specially represented, that the economic health of the nation must be the first care of the Government. Moreover in Germany the war has brought into actual existence those *Berufstände*, the lack of which had made Bismarck's experiment an impossibility.

The nation is organized not only according to classes but according to professions, and the years immediately following the war show a marked tendency to break down the class division in favour of the professional. The organization of

¹ R. H. Finer, *Representative Government and a Parliament of Industry*, pp. 7-19.

the industrial alliances in 1918 meant in fact the organization of each industry as a whole; the antagonism of employer and employee still remains, but it does not exclude the realization of a common interest in the well-being of the industry in which both are engaged.¹

We have seen that the introduction of the Council system into the constitution was the result of the direct action of the extremists. None the less many who were not members of the Socialist parties had, as a result of the pushing into the foreground of economic questions, become convinced that the democratization of the political life of the nation must be accompanied by a democratization of her industrial life.

¹ Tartarin-Tarnheyden, *op. cit.*, especially Buch 1, Abschnitt 1, par. 7, *Der Aufmarsch der Berufsstände*.

p. 53: Dass heute in Deutschland aber der erdrückende Teil aller Berufsangehörigen organisiert ist, und dass auch die formell nicht organisierten die Berufsorganisationen als Vertretungen ihrer Interessen ansehen, dürfte keinem Zweifel unterliegen.

pp. 54-5: Die Arbeitsgemeinschaften bedeuten nicht nur ein Bestimmungsrecht der Arbeiterschaft in Wirtschaftsfragen, sondern auch die Anerkennung von seiten der Arbeiterschaft der komplizierten deutschen Wirtschaftsmechanismus. . . . Gestern noch—Klasse gegen Klasse, Unternehmertums und Arbeiterschaft gegeneinander . . . Heute—die wirtschaftlichen Berufstände nebeneinander, und alle zusammen, als wirtschaftliche Verkörperung der Volksgemeinschaft—ein wirtschaftlicher Gesamtorganismus.

CHAPTER III

COMPARATIVE SURVEY

IN the following chapters an attempt has been made to illustrate these general theories by reference to particular constitutions. A considerable amount of space has been devoted to Germany; this is because the German Constitution is the most fruitful of new ideas, and because it has had considerable influence on other new constitutions.

The Germans have made use of all the devices new and old by which a democracy can express itself, and have sought at the same time to find room for the application of those new theories to which we have alluded. Cabinet government has been borrowed from England, the idea of a strong popular President from America, direct legislation from Switzerland. The President and the Reichstag are to occupy a position of equal importance; both are representatives of the sovereign people, each is to act as a counterpoise to the other; in cases of dispute the decision rests with the people. A referendum can be brought about by the decision of the President, or of a minority of the Reichstag, or on the demand of a section of the people themselves. The complication does not end here. The Reichstag is the chief legislative authority, but it is not the only representative assembly; a Reichsrat or second chamber has been established to represent the interests of the member States and to serve as a check on the actions of the Reichstag, and an Economic Council to give expression to the needs of the industrial life of the nation.

The constitutions of Latvia, Lithuania, and Estonia are interesting because in them we find the most simple and perfect application of the democratic principle. The people

are sovereign; they elect the single representative assembly; the assembly in its turn appoints the executive Government. The superiority of the electors over the elected is ensured. The people by a direct vote can at all times override the decision of their representatives and can demand new elections whenever those representatives have forfeited their confidence. A simple system of this kind is obviously appropriate in small States inhabited chiefly by an agricultural population of strong radical opinions. The population of Latvia and Lithuania is not above two millions, and that of Estonia only about 1,200,000. The popular representative assembly in each case numbers only one hundred members, and, apart from the fact that a second chamber was considered undemocratic, all suggestions to introduce the bicameral system were refused on the score that the financial burden would be too heavy in so small a State. The establishment of these countries as independent communities has been accompanied by the triumph of the class of small farmers and peasant proprietors over the big landlords of German extraction. The large estates were broken up and divided amongst the peasants; the economic position of the new class of peasant proprietors is strong, and it has preponderating political power. These small farmers may be conservative in temperament, but their political opinions are advanced; they are not, as in this country, dependent upon the patronage and support of the land-owning aristocracy, but owe their own prosperity to the dispossession of that very class. Nature can show few more striking contrasts than that presented by the bleak sandy plains on the shores of the Baltic and the magnificent mountains and fertile valleys of Switzerland. Yet a parallel can be drawn between the political and social conditions of these northern States and those of that earlier

Republic to which they looked so often for inspiration and guidance when setting up their constitutions; and it would perhaps not be forcing the resemblance too far to see in the conservatism of temperament and independence of outlook of the Swiss and Baltic peasant a reason for the comparatively successful application in these new States of characteristic Swiss institutions such as the referendum and initiative.

It should, however, be observed that the Baltic States have entirely failed in so far as they have attempted to imitate the Swiss system of executive government. None of these States have succeeded in obtaining the continuity of the collegiate system. Party strife in these small agrarian countries, where the number of conflicting interests cannot be large, is as violent as in France or Germany.

The constitutions of Poland, Czechoslovakia, and Yugoslavia are more conservative in form; they do not show so marked a divergence from the constitutions of the nineteenth century; more power is given to Parliament and less to the people.

The Polish Constitution of 1921 stands out as the model of the old order. In its main provisions it is an imitation of the French Constitution of 1875. The centre of power is in a Parliament consisting of two houses. The President is a mere figure-head: he is elected by a joint session of the two houses of the Legislative Assembly and has no independent power; direct legislation is altogether excluded.

It is not yet possible to give an opinion as to what will be the final effect of the *coup d'état* of June 1926 on the constitutional development of Poland.

Pilsudski appears still to hesitate between the role of a Mussolini striving to save his country by the strong hand of a dictator and a self-sacrificing Republican determined to

purify and revive a corrupt democracy and, this task accomplished, seeking only to pass the rest of his days in obscurity. The immediate result has been to bring the Polish Constitution more closely into line with the modern tendencies to which we have referred. Parliament has aroused profound distrust. An attempt has been made to strengthen the executive as against the Representative Assembly. The original intention of Pilsudski was to accomplish this end by giving wide powers to the President. As a result of the opposition of the Socialists the scheme was considerably modified. According to the constitutional amendment as finally adopted in August 1926,¹ the President, with the approval of the Cabinet, can dissolve Parliament and supplement the legislative work of the Sjem by decree. The statements made by Pilsudski and his supporters are often confused and inconsistent. It is not clear whether the ultimate object is to create a strong independent presidency or to give power directly to the Cabinet. The former view seems the more probable. It is significant that in all the statements made on the subject the legislature and executive are referred to as separate, hostile powers. The object of the constitution must be to create harmony by giving them a position of equal but independent authority. When insisting on the necessity for constitutional revision, the Minister of Justice, M. Makowski, declared that 'all modern democracies, and not only that of Poland, are wearied of political demagogy. The Parliament, chosen by election, must be one of the elements of political life, but not the only one. Side by side with Parliament room must be found for the Government, and side by side with the Government for the representation of social interests,

¹ Law of the 2nd August 1926, modifying and completing the constitution of the Republic of Poland of the 17th March 1921.

that is to say for organized democracy, for the democracy of the future.'

The new constitution of Yugoslavia is in its main provisions a close imitation of the Serbian Constitution of 1904. Political power is divided between the King and the single representative assembly.

The framers of the constitution of Czechoslovakia were not uninfluenced by Germany and America. The establishment of a constitutional court to give judgement as to whether the legislation of Parliament is in conformity with the constitution is a direct result of the example of America. Although many were in favour of a strong presidency, distrust of the legislative assembly was not sufficiently acute to justify the election of the President by the whole people or to break down the prejudice entertained in many quarters against direct legislation. A check on the actions of the popular assembly is, however, secured by the suspensive veto of the President and of the upper house.

The new constitution of Finland has more historic interest and owes less to abstract theory than any other with which we are here concerned. When Finland in 1809 was united with the Russian Empire she did not immediately lose her independence. She continued to be governed in the main by the Swedish Constitution of 1772, as amended by the Act of Union and Security of 1789. The Czar as Grand Duke of Finland merely took the place of the King of Sweden. The subsequent history of Finland consists of a struggle between the Finnish Nationalists on the one hand to maintain their autonomy as a self-governing province, and the Russian Government on the other to draw Finland into the uniform system of administration under one central imperial authority. 'One law, one Church, one tongue', must be the rule

for the whole Empire. The new constitution of the Independent State of Finland does not constitute a breach with the past. The old organic laws of the province have been revived and amplified. The influence of Swedish constitutional law is apparent in the new constitution as it was in the old fundamental law.

The constitutions of the Scandinavian countries are interesting because they have followed a course of development in some ways similar to our own. A point was reached when the powers of the State were almost equally divided between the hereditary monarch and the estates of the realm represented in Parliament. In these countries, as in England, the division of forces led to frequent deadlocks and disputes; in both cases a remedy was found in the establishment of a council of ministers or 'Cabinet' owing responsibility to both King and Parliament. In England a further development followed; the King lost influence in the choice of the ministers, the Cabinet became a committee of the House of Commons. The constitution of Sweden developed more slowly; the Finns have imitated it at a point when the King still had very real influence; the place of the King has been filled by a President who is elected by the whole people, and has considerable independent powers.

Our faith in Cabinet government may be revived by the consideration that it is not a peculiar arrangement once hit upon in this country and then adopted with scant criticism in the rest of Europe. The fact that the same device has been employed in the Scandinavian countries, without any conscious intention of imitation, seems to show that it is a natural solution of the problem of combining a strong executive with the rule of a popular representative assembly.

A considerable section of each of these constitutions consists of a restatement and amplification of generally accepted

principles. These have for their object the protection of the so-called rights and the liberties of the subject. They were devised in England after years of conflict in the form of practical guarantees against arbitrary acts on the part of the Government. In this country they find their sanction in what Dicey calls the rule of law.¹

They were stated as general principles in the American Declaration of Independence and in the Declaration of the Rights of Man. They were included in the text of the Belgian Constitution of 1831,² and have since then become part of the general body of constitutional law, repeated with amplifications in every subsequent continental constitution.

All citizens are equal before the law; punishment of any kind is possible only for breach of law and in accordance with the law. The interference of the Government in the liberty or property of a subject is possible only in virtue of the law. Within the limits of the law of libel there shall be freedom of speech and freedom of the press. The secrecy of the postal and telegraphic communications is guaranteed. The citizens have the right to hold public meetings, unarmed, so long as they do not disturb the public peace.³

¹ Dicey, *Law of the Constitution*, Part II.

² Constitution of Belgium, 7 February 1831: Section II, Belgian citizens and their rights.

³ e.g. German Constitution, Chapter II, Section 1.

Arts. 109-18, especially Arts. 107, 114, 115, 116, 117, 118.

Polish Constitution, Arts. 96, 97, 98, 99, 100, 104, 105, 106.

Estonian Constitution, Section II: Fundamental rights of Estonian citizens, especially Arts. 6, 7, 8, 9, 10, 13, 14, 15, 16, 17. N.B. Art. 6: 'All Estonian citizens are equal in the eyes of the law. There cannot be any public privileges or prejudices derived from birth, religion, sex, rank or nationality. In Estonia there are no class divisions or titles.'

Art. 13: 'In Estonia there is freedom for the expression of personal opinions in ideas, print, letters, pictures, and sculpture.'

The new constitutions include provisions securing the civil and political equality of men and women. They forbid the grant of hereditary titles and in many cases titles or distinctions of any kind. In the same category may be included provisions securing the so-called privileges of Parliament:¹ freedom of election; irresponsibility of members; freedom from arrest, unless the consent of the assembly be obtained, or the member be caught in the act of breaking the law; and the right to decide disputed elections.² These guarantees also were devised in England at the time when interference by the executive Government in the actions of Parliament was still possible.

These clauses have all been excluded from detailed discussion in a study the object of which is to throw light upon new movements, not to investigate and describe again what is repeated almost automatically in every democratic constitution. For the same reason no account has been given of the judiciary system. The independent position of the judges is of the greatest importance to the maintenance of freedom.

¹ e.g. German Constitution, Arts. 36, 37, 38; Czechoslovak Constitution, Arts. 23, 24, 25, 26.

² The new German Constitution gives the right to decide disputed elections to an electoral commission consisting partly of members of the Reichstag and partly of judges of the National Administrative Court. This is in imitation of the modern English practice, according to which the verification of elections is considered as an act of adjudication and is entrusted to a separate tribunal.—German Constitution, Art. 31; also Brunet, *op. cit.*, p. 132. In Czechoslovakia an electoral court has been established to decide on the validity of elections to Parliament. The court consists of members appointed by the President from among the judges of the Supreme Administrative Tribunal and of members chosen by the Chamber of Deputies; they must be learned in the law and cannot belong to either Chamber.—Art. 19; also Édouard Jolly, *Le Pouvoir législatif dans la République Tchécoslovaque*, p. 58.

All reference to the subject has been omitted from the following pages, since in this respect the framers of the new constitutions have simply imitated their predecessors in other countries.

Two further questions that do not strictly speaking come within the scope of this book, but are interesting and important enough to merit some consideration, are the relation of Church and State and the control of the State over education.

The new constitutions are in their main provisions the work of Liberals and Social Democrats. With the exception of the German Centre, continental Liberalism and Socialism are anti-ecclesiastical. Religion is considered as a private question concerning the individual alone; the State has no authority to prescribe a certain form of worship or to forbid the exercise of any other. In conformity with general democratic theory these constitutions, therefore, all contain provisions securing liberty of conscience and freedom of worship. All creeds and religions are allowed so long as their exercise does not interfere with public morality or infringe the ordinary law. No individual can suffer disability of any kind on the grounds of religion; the State has no authority to inquire into the religion of a subject.¹ In most of these countries, however, religious feeling was too strong amongst at least some sections of the people to make possible a complete separation of Church and State.

In Germany the Centre, or Catholic, Party was in a particularly strong position. It was one of the chief elements in the coalition by which the constitution was framed and adopted; it was at the time the second largest party in the

¹ e.g. German Constitution, Arts. 135, 136; Czechoslovak Constitution, Arts. 121, 122, 124, 125; Polish Constitution, Arts. 111, 112.

Reich, and was, as it has long been, one of the strongest and most united. It has adopted Liberalism, not as its first object, but as the best means of securing the desired position of strength and freedom for the Catholic Church. The Centre Party stands primarily for the union of Church and State and for freedom of instruction. Without the support of the Centre, the Socialists and Democrats would have been powerless against the parties of the Right; they were compelled, therefore, to make certain concessions on religious questions, concessions won by the Catholics, but equally beneficial in their results to all recognized Churches. In Germany there is no State Church;¹ each religious denomination administers its own affairs; the State cannot interfere in any way; it cannot decree articles of faith or exercise control over ecclesiastical appointments. Religious organizations are, however, recognized as corporate bodies, and as such receive special legal protection. New religious organizations of sufficient size to guarantee their permanent existence will be able to obtain such recognition in the future. These corporate bodies have the right to levy taxes from their members on the basis of lists established for the collection of civil taxes.

Education is looked upon as a function of the State.² The Government does not only supervise, it is responsible for providing public instruction, and such instruction must form an organized whole. Private schools, with certain exceptions, are not allowed. Education throughout the country must therefore be uniform; attendance at school is compulsory, at the elementary schools for eight years, and at the continuation schools until the completion of the eighteenth year.³

Instruction is free in elementary schools, and the State or

¹ Art. 137.

² Art. 143.

³ Art. 145.

municipality must provide assistance to poor parents for the further education of their children if they are deemed qualified for instruction in the secondary or higher schools. In the ordinary State schools religious instruction is optional; the parents or guardians of each child declare on its entering the school whether they wish it to receive religious instruction and, if so, in what creed. The school authorities must provide instruction, if demanded, in the creeds of all recognized Churches; room must be provided for such instruction in the ordinary time-table.¹

The German Constitution does not follow the English practice of allowing schools conducted by religious organizations to continue under the supervision of the public educational authorities, and to receive State aid. Room, however, has been made in the ordinary educational system for strictly secular and for denominational schools. Existing denominational and secular schools may continue and new ones be established in the future if a formal demand is made by a sufficient number of heads of families; such schools must conform with the general system of State education and reach a high educational standard.²

Most of the new constitutions have adopted a similar attitude towards religious bodies and education. Although no Church is especially favoured, all can obtain legal recognition.³ In Yugoslavia⁴ the constitution admits the possibility that the State may give pecuniary aid to religious organizations; such pecuniary assistance, if made at all, shall be 'divided amongst lawful and recognized spiritual bodies according to the number of their members and their

¹ Art. 149.

² Art. 145, par. 2; Art. 147.

³ e. g. Lithuanian Constitution, Art. 83; Polish Constitution, Arts. 114, 116.

⁴ Art. 12.

actually shown necessity'. The State schools provide religious instruction in the creeds of all recognized Churches. The parents decide what form such instruction shall take in the case of each particular child.¹ In most cases the general system of State education does not leave room for separate denominational or secular schools.

In this respect Lithuania constitutes an exception. The majority of the people are Catholic, and the influence of the priests was sufficiently strong to prevent the secularization of State education. Religious instruction is compulsory in ordinary State schools, but special secular schools may be established for children whose parents belong to no religious organization.² Lithuania has also adopted the English system of giving State aid to schools established and conducted by religious bodies, 'if they carry out the minimum programme laid down by the laws'.³ The English influence has probably been received indirectly through the minority treaties established between the new European States and the principal Allied and Associated Powers. These treaties provide that State aid shall in some cases be given to the schools of national and religious minorities. The educational clauses in these treaties were based upon English precedents, and as far as the treatment of minorities is concerned they imposed upon many of the new States of Europe 'a form of administration which is peculiarly of English origin'.⁴

Certain further exceptions must be noticed. In Poland religious feeling was too strong to make possible any serious attempt to disestablish the Catholic Church. 'The Roman

¹ Yugoslav Constitution, Art. 16; Polish Constitution, Art. 120.

² Art. 80.

³ Art. 82.

⁴ Temperley, ed., *A History of the Peace Conference of Paris*, vol. v, p. 137.

Catholic Religion, being the religion of the preponderant majority of the nation, occupies in the State the chief position amongst enfranchised religions.¹ The relation of the Church to the State is to be determined by a concordat between the Polish Government and the Pope. The agreement must be ratified by the Diet. Other Churches can obtain legal recognition; such recognition cannot be refused to bodies whose teaching or precepts are not opposed to public order or morality. Religious instruction must be given in all schools supported entirely or in part by the State; the various religious bodies are responsible for this religious instruction, but they are subject always to the supervision of the State.² Religious ministration must be provided by the State for all citizens in public institutions, in schools, prisons, barracks, hospitals, and asylums.³

Lutheranism has always gained its most fervent supporters in the north of Germany and on the shores of the Baltic. In Finland the evangelical Lutheran Church is established as the State Church; other religious associations can obtain legal recognition.⁴

In Estonia⁵ and Czechoslovakia,⁶ on the other hand, the constitution provides for complete secularization. All religions are tolerated so long as their exercise does not conflict with the ordinary law; none are recognized. State schools are secular; the Czechoslovak Constitution provides that 'Public instruction shall be given so as not to conflict with the result of scientific investigation'. Private schools may be established within the limits of the law; the supreme control of all instruction and education is in the hands of the State.

¹ Art. 114.² Art. 120.³ Art. 102.⁴ Art. 83.⁵ Art. 11.⁶ Art. 119; also Arts. 121, 122, 124.

The attempt to carry out these clauses of the constitutions has in both countries led to considerable opposition. In Estonia a Bill according to which religious instruction shall be provided in State schools was introduced by popular initiative and accepted as the result of a plebiscite. In Czechoslovakia the Catholic People's party has strongly opposed the separation from Rome. In Bohemia the intellectual classes are for the most part indifferent to religion or open unbelievers, the industrial masses are often violently anti-clerical. This anti-religious feeling and hostility to Rome was fostered during the period of Austrian rule by the knowledge that the Catholic hierarchy were, with few exceptions, subservient nominees of the Habsburgs and the bitter enemies of Czech nationalism. The constitution was the work of this free-thinking, national element in the Czech nation. In Slovakia, on the other hand, the people are for the most part simple peasants and they are devoutly religious. The anti-clerical spirit of the Czech Government and the introduction of free-thinking Czech schoolmasters into Slovakia has been one of the main causes leading to the hostility of the former Hungarian province to the Government at Prague, and it has done much to aggravate the separatism of the Slovak Peasants' party.¹

To return to a consideration of the constitutions as a whole, the most obvious criticism that can be brought against them is that they are often inconsistent, that they all show signs of compromise between different and often conflicting opinions.

The German Constitution is a compromise between the growing desire for national unity and the determination of the member States to maintain their independent existence; between the Liberals and Catholic Centre to guard the

¹ R. W. Seton-Watson, *The New Slovakia*.

freedom of the individual and the Socialists to press all citizens to the service of the community; between the bourgeois and capitalist classes to maintain the social system which had given them power, and the working population to win special protection and a special position for labour. In Poland and in Yugoslavia the introduction of economic clauses into a constitution as a kind of afterthought was the result of a compromise between the Liberal parties in the Government and the Socialist opposition. In Poland and in Czechoslovakia the more conservative parties obtained the adoption of the bicameral system, but, as a result of the opposition of the left, the upper chambers actually established have so little power that they can scarcely arouse the hostility of any but the most ardent supporters of the single chamber system.

As a result, these constitutions as finally adopted are contained in long rambling documents, the separate clauses of which are sometimes inconsistent or even contradictory. Many of the most important provisions were in each case passed by only small majorities. This, however, is not altogether a disadvantage; considered merely as a constitution the result may be less satisfactory than if one party had been able consistently to carry through its ideas, the practical advantage remains that the constitution as a whole was passed by a large majority and rests on the support of the great mass of the nation. The German Constitution was passed by a vote of 262 against 75. Even the Nationalist and People's parties, who voted against the final draft, took an active and often creative part in the work of the Constituent Assembly. A small body of Independent Socialists alone took up an attitude of factious and irreconcilable opposition. In Poland the Socialist and Populist Radicals alone refused to vote for

the constitution as a whole, but the leader of the Socialists, when declaring that his party would not consider itself justified in giving direct support to a document which provided for a second chamber, but excluded a chamber of labour and the use of the referendum in any form, nevertheless felt himself called upon to declare, on behalf of his party, that the passing of the constitution was a great sign of progress, and that Poland had thereby put herself into the forefront of democratic nations.¹

In Yugoslavia, as far as the sections dealing with local government are concerned, we have a striking example of the triumph of one single opinion. Schemes providing for every kind of federal union and local autonomy were suggested. They were all refused in favour of a completely centralized administrative system. As a result the constitution on paper is logical, clear, and consistent, but it has aroused violent opposition, and it was passed by only a bare majority of the assembly.² It is daily becoming more apparent that if the strife of irreconcilables is to be appeased a drastic constitutional revision must take place.

When conflicting parties are able to compromise on particular points in order that they may agree on a general issue, the first step towards the efficient working of democracy has already been taken. That the form of a constitution is imperfect matters little; that all parties be equally determined

¹ Michael Potulich, *Constitution de la République de Pologne*, pp. 12-13, text and notes.

² There voted: For the constitution, 223 (Radicals, Democrats, and Mohammedans); against the constitution, 35 (Socialists, Republicans, and Agrarians). There were absent or did not vote: 161 (Croatian Party, Croatian National Club, Yugoslav Club, and Communists).—Nikodic Yovanovitch, *Étude sur la constitution du Royaume des Serbes, Croates et Slovènes*, p. 76.

to support and maintain it is essential to the tranquillity and well-being of the community.

In most of these countries very little discrimination has been shown as to the questions that are included in the texts of the constitutions. Many of the clauses have no connexion with the distribution of political power in the State. They are mere statements of policy on the part of the Governments who were in power at the time of the adoption of the constitutions. It would be impossible to enforce them on subsequent Governments. Such clauses have not been altogether excluded from discussion in the following pages: more attention has been paid to other matters, such as the details of the electoral law, which, although not included in the texts of the constitutions, are essentially connected with the working of the constitutional authorities.

In studying the constitutions of several of the new States, especially in the case of Poland, Yugoslavia, and Czechoslovakia, it must be remembered that the practice of democratic government has been made difficult by the existence of considerable national minorities, who may endure the rule of the new Government as a necessary evil which they are powerless to resist, but who refuse to take an active part in the Government, except perhaps to obstruct, and do not co-operate in strengthening and developing the powers and resources of the nation. The extension of their frontiers to include territory inhabited by members of other nationalities has not been an unmixed advantage to the new States. As a result the introduction of democratic forms of government has been fraught with considerable difficulties. Democracy can work effectively only amongst a people who agree on fundamentals. Divergence of opinion may be a sign of health in a Republic, a sign of the active interest of an ener-

getic and aspiring people in the good of their country. Such divergence, however, must touch only the more immediate question of ways and means; so long as all agree that the prosperity of the State must be their first object, the maintenance of the constitution their first care, it does not matter that they differ in opinion as to the best means by which that welfare is to be won, that security achieved. But as soon as certain sections of the community look upon the very existence of the State to which they perforce belong as detrimental to the fulfilment of their dearest desires, or as soon as they consider the fundamental principle on which it is organized as contrary to the attainment of that general prosperity which should be the highest reward of true national service; as soon as any considerable number of people is placed in permanent and violent opposition, true democracy becomes impossible. All the forms of democratic government hitherto devised depend ultimately on the fact that the decision of the majority is considered binding. This rule of the majority can win theoretic justification only on the supposition that all have agreed that they will in fact submit to the opinion of the largest section of the people; it can lose its practical sting only when the minority of to-day becomes the majority of to-morrow. At the root of the body politic there must always be unanimity.

It does not follow that with time a prosperous and united State may not be welded out of elements at first discordant.¹ It is inevitable that during the transition period the practice of representative democracy should be faced with almost insurmountable difficulties. As soon as the minority does not

¹ In Czechoslovakia, where the results of racial antagonism were at first most acutely felt, the national minorities have already begun to give up their attitude of irreconcilable opposition.

easily submit to the decisions of the majority, the Government will on the one hand be weakened by lack of general support and will seek to strengthen itself on the other by use of weapons scarcely compatible with the spirit of true democracy. Freedom of speech and freedom of the press are practical possibilities only when the opinions that people wish to express are not really very different. This being the case, it is not surprising that the constitutions of those countries in which the actual formation of the new State was fraught with considerable internal difficulties should show a certain reluctance to adopt the most advanced democratic forms.

A further difficulty with which these States are faced is that considerable sections of the people are entirely without political knowledge or experience. A democratic form of government, if it is to work effectively, demands not only the tacit consent but the active participation of the whole nation. A high standard of education and intelligence is necessary amongst the whole body of the people. This is especially the case if universal suffrage has been introduced, as in the new constitutions. In Yugoslavia it has been calculated that the majority of the whole population are illiterate. A special electoral procedure has been prescribed for this reason. In the voting booth an urn is provided for each party; the voter is given a small wooden ball, which he must drop into the urn of the party for which he intends to vote; in order to ensure secrecy he must plunge his hand successively into each urn. The list of candidates of the party is written clearly on the urn, but a member of the party is allotted to stand beside it and explain the list to those electors who cannot read. In spite of these precautions it is obviously not difficult to bring illegitimate influence to bear upon the elector. In Czechoslovakia and Poland similar difficulties are experienced. The

former Austrian province of Bohemia is highly industrialized and the people are progressive, but the peasants of Slovakia and Ruthenia are for the most part uneducated, as are the agricultural population in many parts of Poland, especially in Galicia. These peasants are not without strong national prejudices; they are anxious to maintain their own customs and traditions; they may even desire independence; but they are incapable of administering their own affairs, of forming an independent judgement on political questions, of choosing their own party or deciding on the respective merits of different candidates. Under these circumstances they fall an easy prey to the political agitator, and democracy becomes a mere farce. The success of the Communists in Ruthenia and Slovakia is attributed to the fact that unscrupulous politicians are able to trade on the ingenuousness of the peasant; he is told that the red voting card will bring him immunity from taxation, wild promises are made, his feet are measured for new shoes and his back for a new coat. That at the last election the majority of the members returned for Ruthenia were Communists is not a sign that the Ruthenian peasant is a Communist or that he knows anything of the Third International. Like all children of the soil he is conservative in temperament, and he is religious almost to the degree of superstition, but he is discontented with the rule of the Czech, and that he voted Communist means only that unscrupulous politicians by abusing the Czech Government were able to overcome his subserviency to the priest and persuade him to vote for a party which had nothing to commend itself to him but a common antagonism to the Government at Prague.

In the Baltic States the lack of a sufficiently numerous educated class for the work of government and administra-

tion is a great drawback. This is especially the case in Lithuania, the only one of these States which is preponderantly Catholic; in consequence much influence falls to the priests. Before the war higher education was almost exclusively confined to the seminaries. The Christian Democratic party, which has formed the basis of most of the coalition Governments, is run almost entirely by priests; the greater number of political and public offices are in their hands.

The following pages will offer frequent occasion for criticism both of the form and the practical efficiency of the constitutions of which a brief analysis has been given. It must not be supposed that such criticism has been levelled without full realization of the difficulties by which statesmen were faced in the years after the war, especially in those countries which are dealt with here, countries in which a new State has been forged out of antagonistic and discordant elements, or in which reorganization was necessary after a period of revolutionary disorder. That in the circumstances a democratic Government could be established at all is surprising; that such a Government has in most cases won the support of the greater part of the nation, and has during the last three or four years been growing steadily in stability and authority, is in itself a triumph. This must always be kept in mind when considering individual shortcomings.

PART II

THE TERRITORY OF THE STATE

CHAPTER IV

FEDERALISM AND LOCAL GOVERNMENT

WHEN a new State is being formed the first problem that must be faced is that of territory. The external boundaries must be defined and recognized by other States; the internal relationship between districts, provinces, or member States must be established. With the question of external boundaries we are not here concerned; after careful consideration it has been decided also to omit all detailed consideration of the closely related problems of local government, local autonomy, or federalism. These are all questions of paramount interest and importance; it is not possible, however, to separate them from political issues of great moment, and of great interest to the student of the particular countries concerned, but not strictly relevant in a work dealing primarily with the development of institutions.

Local government, the extent to which all the powers of State and duties of administration are concentrated in one single central authority or are allotted to local bodies, is a problem that must be faced in every country. The whole question, however, is so vast that it may be considered to constitute a subject in itself, and as it does not play any important part in the actual texts of most of the new constitutions it has been thought wiser to deal with it here only in those cases where it presents a particular interest or importance.

Federalism is a particular solution devised to meet those cases in which a number of territorial units, having an independent existence of their own, wish to join in a wider union without losing their own identity. It is a solution the value of which depends upon the circumstances in each particular case.

In the new States we have ample example of the difficulties arising through the union under one common Government of peoples differing in race, nationality, language, or religion; they may be anxious to maintain their own identity, and are yet too small in numbers, or too isolated, to be set up as independent nations, or to be joined with their compatriots in other countries. In such cases Federalism would seem the obvious solution; it has in fact been adopted only in Germany and in Austria, and in these countries the distinction between the component States is one of historical tradition, or of social or economic antagonism, and not of race or language. It was suggested but refused in Poland and in Yugoslavia; the other new States are so obviously unitary in character, or such racial minorities as exist are so small in numbers, that there seemed no object in proposing a federal form of government.

It was hoped at one time that a greater Poland might be created by a federal union of the lands that now constitute Poland, Lithuania, the Free City of Danzig, and the Polish Province of Eastern Galicia. The plan broke down because the Poles would not accept a federal form of government and the Lithuanians insisted on complete independence. The Galicians, in spite of their protests, were incorporated in Poland; Danzig could not be given over to the rule of a sovereign Polish State, and was established as a free city.

The kingdom of Yugoslavia¹ consists of a union of the old kingdom of Serbia and of the kingdom of Montenegro with the Serbs, Croats, and Slovenes of the former Austro-Hungarian Empire, who after the fall of the dual monarchy organized themselves in an independent community. These peoples were joined by the common determination to maintain or to win their independence in opposition to Austria-Hungary. They differ, however, on many important points; the Serbians and Montenegrins belong to the Greek Church, the Croats and Slovenes are Catholic; years passed under the rule of different Governments have brought out and strengthened divergent characteristics.

This was obviously a case in which a federal form of government might profitably have been established. When the National Council of the Austro-Hungarian Yugoslavs determined to seek union with the kingdom of Serbia, M. Radić, the leader of the Croatian People's Party, proposed that such a union should take the form of a loose federation.² Executive power should be entrusted to three regents, the Hereditary Prince of Serbia, the Ban of Croatia, and the President of the Local Government of Slovenia. The federal Government should be responsible to a federal council of forty-two members chosen by the local assemblies. All affairs not specifically entrusted to the common federal

¹ This account of the building up of the Yugoslav State and of the system of local government in that country is based upon an article by M. Subotić in the *Slavonic Review*, vol. ii, p. 5. M. Subotić gives a summary of the material contained in *Ustavno Pravo Kraljevine Srba Hrvata i Slovenaca* (The constitutional law of the Serbs, Croats, and Slovenes), by Sloboban Yovanovitch. See also Temperley, ed., *A History of the Peace Conference of Paris*, vol. iv, pp. 176 et seq.

² Nikodje Yovanovitch, *Étude sur la constitution des Serbes, Croates et Slovènes*, pp. 46-7.

Government were to be conducted by the local autonomous Governments. This project was refused; it was finally agreed that a Constituent Assembly should be called to decide on the form of the State and to draw up the constitution. A first indication of the policy that was adopted by the Serbian Nationalists was to be seen in the words of the Serbian Regent, when, in accepting the proposals of the delegates of the National Council, he declared that a union had taken place between 'Serbia and the lands of the independent State of the Slovenes, Croats, and Serbs, into one kingdom of the Serbs, Croats, and Slovenes'. By so doing he denied that the National Assembly was a sovereign body with power to decide on the form of the future State; the State already existed; the function of the Assembly was only, subject to certain restrictions, to draw up a constitution. Much controversy subsequently arose as to the legal position and rights of the Assembly; the Government parties, the Radicals and Democrats, continued to hold that the Assembly was empowered only to draw up a constitution for an already existing unitary kingdom. Federalism from the first seemed doomed to rejection.

The final draft of the constitution provides for a highly centralized form of local administration.¹ The whole country is to be divided into counties which must not exceed a certain maximum population.² The counties are again subdivided into districts, hundreds, and communes. The administration of the county is carried on by the Grand Zupan, a high

¹ Arts. 95-101, and Nikodje Yovanovitch, *op. cit.*, pp. 226-31.

² Art. 95: 'A province can have at the most 800,000 inhabitants. Two or more smaller provinces can unite in one large one. The final decision rests with the provincial conventions of the said provinces, and such a province cannot have more than 800,000 inhabitants.'

official appointed by the Central Government; the various ministers can appoint experts to help him with their advice. At the head of the district is the Nacelnik, who is also appointed directly by the Central Government. Through him the Grand Zupan controls the Poglavar, who is the chief Government official appointed to administer the affairs of the hundred. Local popular assemblies meet in the county and in the hundred, but their powers and functions are necessarily very limited.

These clauses were violently attacked by the opposition, who argued that the Government had confused unitarism and centralization, and 'under cover of forming a unitary State had produced a centralized government found elsewhere only in France'. The Government answered that Serbs, Croats, and Slovenes were in fact one people; they had been forced by foreign Powers to live apart; now that the foreign yoke had been removed, the sense of national unity had emerged triumphant and broken down all barriers formed by political institutions, language, or religion. That the sense of unity might be preserved and fostered it was essential that the former geographical divisions into which the people had been divided by an alien rule should be abolished. 'For the purposes of local government a number of entirely new divisions must be established. They must not be allowed to revive the old provinces, must not be large enough to allow of racial grouping.' 'A large number of small provinces must take the place of a small number of large ones.'¹

After much opposition the constitution was finally passed in this form by a small majority of the Assembly; the Croa-

¹ Subotić, *op. cit.*

tian People's Party protested by absenting themselves on the day of the vote.

Although the other new States were not fitted for a general federal system, protection has been given to national minorities, in some by a special grant of local autonomy, in others by treaty engagements with foreign Powers securing freedom of religion and education and the maintenance of national customs.¹ The Allied and Associated Powers when establishing these new States were often compelled for geographical and other reasons to assign to them territories inhabited by members of different nationalities; they took the view that the responsibility of handing over these peoples to a foreign rule could be undertaken only if the States concerned would consent to sign treaties guaranteeing certain liberties and privileges. Any infringement of the rights of minorities would be considered as a breach of a treaty obligation with a foreign Power and could be brought by such a power before the Council of the League of Nations. In this way only could the rights of the minorities be protected without infringing the sovereignty of the States concerned. The minorities cannot appeal directly to the League of Nations. They can obtain redress by foreign intervention only if one of the signatories of the original minority treaty can be induced to take up their case. Special stipulations protecting the liberties of national minorities have in accordance with these treaties been included in the constitutions. In Poland,² Czechoslovakia,³ Latvia,⁴

¹ Temperley, ed., *A History of the Peace Conference of Paris*, vol. v, Chap. II.

² Arts. 109, 110, 115.

³ Section V. 1, especially Arts. 128 (1) and (2) and 130, 131, 132.

⁴ The Latvian Constitution is a short, concise document; unlike the other new constitutions it contains no statements of general principles dealing with the rights and liberties of the subject. Questions connected with religion and education were left for regulation by ordinary law. The

Lithuania,¹ Estonia,² clauses may be found securing to national minorities all the rights of citizenship and also the right to exercise their own religion; to maintain their own customs; to receive education for their children in their own language and in some cases to establish autonomous institutions to promote the interests of their national culture and welfare; to levy taxes on their members, and even to receive a share of the revenues of the State for their own schools and charitable institutions. In Yugoslavia a vigorous opposition was raised to the signing of the minority treaty. The constitution contains only a single reference to the subject.³

In most cases these national minorities were so widely dispersed and scattered in such small groups amongst their fellow countrymen of different race that it was impossible to grant them special territorial rights. In some cases, however, the grant was made to a State of a certain territory inhabited almost entirely by members of another race. In these cases, although the State as a whole may be unitary in character, a special grant of local autonomy has been made raising the particular province to a position similar to that which would be occupied by a member State in a federation.

According to the treaty between the Allied Powers and the Czechoslovak Republic⁴ of 10 September 1919, the territory

position of minorities is, however, amply protected by law, they may exercise their own religion and establish their own schools within the general system of State education. See Max Laserson, 'Das Verfassungsrecht Lettlands', *Jahrbuch des öffentlichen Rechts*, 1923-4, 263-4.

¹ Arts. 73, 74.

² Arts. 6, 12, 21, 22, 23.

³ Art. 16: 'Minorities of different race and language shall receive primary education in their own language according to conditions prescribed by law.'

⁴ Édouard Jolly, *Le Pouvoir législatif dans la République Tchécoslovaque*, p. 131.

of Carpathian Ruthenia was incorporated in Czechoslovakia on condition that it received the widest measure of self-government compatible with the unity of the Czechoslovak Republic. In conformity with this agreement the Czechoslovak Constitution contains clauses by which Ruthenia is to be established as an autonomous territory.¹ It shall have its own Diet, which shall legislate in linguistic, educational, and religious matters, and in all questions of local administration. Laws of the Diet must receive the signature of the President of the Republic and of the Governor of Ruthenia. The Governor is to be appointed by the President of the Republic on the recommendation of the Central Government, but he is responsible also to the Diet of Ruthenia. Although wide spheres of legislation are reserved to the Diet, the province takes its full share in the Central Government. 'Carpathian Ruthenia shall be represented in Parliament by deputies and senators elected according to the general suffrage law of the Czechoslovak Republic.'² So far these provisions have not been put in force. Parliamentary elections were held in Ruthenia for the first time in March 1924. The system of autonomous local government provided for in the constitution has not been established. Ruthenia remains within the general system of Czech administration. A native Ruthenian has been appointed as Governor, but his position is purely ornamental; real authority remains with the Vice-Governor, who is a Czech appointed by the Central Government.

During the time when no Governor had been appointed many functions were entrusted directly to the Vice-Governor; he therefore not only holds the substance of power, but is, in accordance with the letter of the law, in a far stronger position than the Governor. Municipal elections

¹ Art. 3.

² Art. 2 (5).

have been held in Ruthenia and have resulted in the return of anti-Czech majorities in the local councils. No Central Diet of the province, such as is provided for in the constitution, has yet been summoned. The Ruthenians have protested against this delay in the promised grant of self-government, and a vigorous anti-Czech agitation is maintained. The Czechs argue that the Ruthenians are illiterate and that they would be completely incapable of administering the province. Under the Czech Vice-Governor the work of reconstruction has been vigorously pursued. The necessary funds are supplied not by the province but by the Czech taxpayer. It is probable that the poverty of the country will postpone for some time yet the establishment of self-governing institutions; each year there is a large deficit, and the leaders of the autonomists are beginning themselves to realize that they cannot expect the Czechs to supply the money if they are deprived of all control of the administration.

Opposition to the Czech Government in Slovakia, aroused chiefly by the introduction of Czech officials and schoolmasters and by the anti-religious tendency of the Government at Prague, has led to the demand for a form of autonomous self-government similar to that guaranteed to Ruthenia by the constitution. This demand has not as yet been complied with. The same objections are apparent as in the case of Ruthenia. Czech officials were introduced originally owing to the inability of the Slovaks to administer their own affairs, and the Slovaks, moreover, have not the advantage of special recognition by a minority treaty or by the constitution. For the first years of the Republic the Slovak People's Party remained in violent opposition to the Central Government. It is, however, probable that the recent entrance of the German Agrarians and of the Slovak

People's Party into M. Svehla's Coalition Government will be followed by the introduction of a new system of local government throughout the whole State.

The city of Memel in the Lithuanian State occupies a somewhat similar position to Ruthenia in Czechoslovakia. The Memel Territory has its own Assembly for local affairs, but also sends deputies to the Lithuanian Parliament. The Governor is appointed by the Lithuanian Government. He has the right of veto in all questions. The President of the directorate is appointed by the Governor, but he must also have the confidence of the Assembly. The first elections for the Memel Assembly were held in 1925. Ninety per cent. of the votes were cast for the 'German United Front'. A prolonged deadlock followed. The Governor declared that the Chamber of Representatives was not a political body, but only an assembly appointed for the furtherances of the economic industrial and agricultural interests of the territory. The representatives replied by demanding the resignation of the directorate and by refusing to accept a new President proposed by the Governor.

These grants of local autonomy and of special privileges to minorities were, as has already been pointed out, the result of foreign intervention. They were the condition on which certain territories were given to the new State by the Allied and Associated Powers. They have, however, provided a model by which the problem of mixed nationalities may be solved in the future. They have already been imitated by other States of their own free will.

The German Constitution contains a clause¹ giving protection to those members of the Reich who speak a different language; the use of their language and the right of free racial

¹ Art. 113.

development is guaranteed, although the German Reich at the present time contains but few members of an alien race.

In Finland the vexed question of the Aaland Islands, the possession of which was long disputed between Finland and Sweden, has at last been settled by establishing them not only as an autonomous province with independent legislative powers, but by putting the maintenance of their independent rights under the protection of the League of Nations.¹ The rights conferred on Aaland by Finland cannot be altered except by a constitutional law and with the consent of the Landsting of Aaland. Aaland has the right of independent legislation in all matters except those specially vested in the Finnish Government. The Landsting chooses the executive Government or Landsrat, the Finnish Government is represented by a Governor appointed by the President, but 'consideration must be paid to the wishes of the people of Aaland when the appointment is made'. The Governor can use his legislative veto only when a law of the Landsting encroaches on the legislative rights of the Republic or is contrary to the general interests of the State. Swedish is the official language of Aaland. Finnish may not be taught in Government schools except on the demand of local government bodies. Finnish citizens can obtain the franchise in Aaland only after five years' residence. Half at least of the land-tax must be spent in the province. The Council of the League of Nations undertakes to supervise the administration of these laws. The Finnish Government must lay before the Council, together with its comments, any complaint made by the Landsting about the administration of these laws.

¹ D. Erich, 'Die Entwicklung des öffentlichen Rechts in Finland', *Jahrbuch des öffentlichen Rechts*, 1922, pp. 116-21.

Finland herself presents an example of a State composed of two nationalities. A not inconsiderable minority of the people, especially amongst the land-holding class, are Swedish-speaking. They have been treated not as a national minority to be specially protected, but as entirely equal in position with their Finnish-speaking compatriots. The constitution provides¹ that 'Finnish and Swedish shall be the national languages of the Republic'. Finnish citizens have the right to use either of these languages before the courts or administrative tribunals.² Laws and ordinances are published in both languages. 'Care shall be taken that the rights of the Finnish population and the rights of the Swedish population of the country shall be protected in accordance with identical principles. . . . The State shall provide for the intellectual and economic needs of the Finnish and Swedish populations in accordance with identical principles.'³ The existing local government districts are to remain for the present, but, whenever circumstances permit, new districts must be formed so as to include inhabitants speaking only one language, Finnish or Swedish, or so that the minority speaking the other language shall be as small as possible.⁴ Finnish is the language of command in the army, but a conscript can ask to be enrolled in a troop the members of which speak his own language and to receive his instructions in that language.⁵

In Germany the problem of unity or federalism was one of the most burning questions on which opinion was divided after the war. The immediate result of the catastrophe in 1918 was a panic-stricken movement towards separation. 'Away from Prussia' was the cry of many who thought to save most from the wreck by separation from those forces that had

¹ Art. 14.² Art. 22.³ Art. 14.⁴ Art. 50.⁵ Art. 75.

led the Empire to greatness and to destruction, and had aroused against Germany the hostility of the greater part of the civilized world. In short Prussia was to be the scapegoat, whilst the other States repudiated her leadership and their own responsibility for common actions and ambitions.

The movement for separation engendered in fear was quickly followed by a revival of the national spirit and a consequent reaction in favour of unity. Only by presenting a united front against a hostile world could the Reich be saved from ruin. This movement in favour of unity was further augmented by the rise to power of the Democrats and Socialists, who had always looked upon the union of all Germans in a single free democratic community as one of their most cherished aims. The identity of the former States, however, still remained, and it was impossible to break down particularist tendencies sufficiently to create an entirely unified State, although this was the ideal of many of those who took part in the work of drawing up the new constitution.

Those who favoured the unitary principle argued that the existing States were only haphazard conglomerations of territory built up by the former ruling dynasties for the achievement of their own selfish ends. Any attempt, however, materially to strengthen the Central Government brought up the problem of Prussia. Centralization meant either the domination of Prussia or her dismemberment. Preuss, the Minister of the Interior and the chief author of the constitution, particularly favoured the idea of unity;¹ he therefore advocated the mobility of frontiers. The old States should be merged in the general unity of the Reich; the

¹ Preuss, *Denkschrift zum Entwurf des allgemeinen Teils der Reichsverfassung, vom 3 Januar 1919*. Reprinted in *Staat, Recht und Freiheit*, J. C. B. Mohr, Tübingen, 1926, pp. 368 et seq.

country should then for the purposes of local government be re-divided into provinces according to the 'economic needs or cultural affinities of the people'.

Preuss argued that it was absurd that within a unity of seventy million Germans there should be a Prussian State of forty millions. This was especially the case since Prussia more than any other of the States represented no real or natural division of the German people. Between the Rhinelander or the Hanoverian, and the Brandenburger or East Prussian, there was no connexion, no bond of union except that established by force of arms. Prussia should be dismembered in favour of a Free Hanover and a Free Rhineland. The small States of Central Germany should be allowed to join in the new State of Thuringia; this was possible only at the expense of Prussia.

It was answered that the power of a strong united Prussia was necessary to maintain the Reich. Germany in her weakened condition could not afford to dispense with the Prussian administration, one of few efficient forces that remained to her. A new democratic Prussia could not be said to tyrannize over the Rhineland or the other component parts. The separation of the Rhineland from Prussia would lead the enemies of Germany to hope for a complete separation from the Reich.

No immediate dismemberment took place, but the constitution in its final form admits the possibility of the mobility of frontiers. 'The division of the commonwealth into States shall serve the highest cultural and economic interests of the country.'¹ State boundaries may be altered or new States created within the commonwealth by means of constitutional amendment. A constitutional change, however, requires a

¹ Art. 18.

two-thirds majority of the Reichstag, and Prussia could in all probability block any constitutional law for her own dismemberment. Clauses were therefore introduced according to which an ordinary law of the Reich may effect such a change, with the consent of the States directly concerned, or without the consent of one of the States, if the change of boundary, or creation of a new State, is demanded by the population and is also required by a 'preponderant national interest'. In order to prevent separatist tendencies in the Rhineland, during the time of enemy occupation, which might lead to a separation not only from Prussia but from the Reich, it was decided that 'no State may be deprived of territory or have its boundaries altered against its will for two years from the time of the adoption of the constitution'.

Even now that this period has elapsed any attempt to dismember Prussia must be fraught with considerable difficulties. A change of boundary can take place by ordinary law against the will of the State only if it is demanded by the people concerned. It is not, however, easy for the people to express the wish for change. A referendum must be demanded by one-third of the inhabitants of the district who are qualified to vote for the National Assembly, and the vote must be carried by a majority of the whole electorate and by a three-fifths majority of those actually voting. So far the territories of Prussia have remained inviolate. The smaller States of Central Germany have by mutual agreement joined in the new State of Thuringia, but the idea of a greater Thuringia failed because Prussia would not give up Erfurt and Erfurt herself preferred to remain with Prussia. Part of Waldeck has joined Prussia, Coburg has united with Bavaria, the rest of Saxe-Coburg-Gotha has joined the new State of Thuringia. The attempt to separate Hanover from Prussia proved a complete

failure. There seems little possibility that the separatist movement in the Rhineland will be renewed, at least not as long as the allied occupation remains.

In effect the German member States are not, as in the American and Swiss Confederations, separate communities with independent rights that cannot be alienated except with their own consent; the Central Government, with the consent of the people immediately concerned, can alter the territory of a State even against its will.

As regards the division of power between the Reich and the States, the unitary tendency has also been strengthened. The constitution of 1871 had recognized the rights of member States to adopt whatever constitutions they desired. The new constitution provides that the Government of the member States must be Republican; that representatives of the people must be elected by universal, secret, and direct suffrage of all German citizens, both men and women, and in accordance with the principles of proportional representation; and that the State Cabinet must enjoy the confidence of the representatives of the people.¹ When defending this clause in the National Assembly Preuss said 'it was hoped that this uniformity of the constitution of the Reich and of the member States would lead to an ever-growing resemblance between all parts of the Reich, and as a result of that to a fortifying and increasing of the unity of the Reich'.²

The fact that the Reichsrat, through which the interests of the States are represented in the Central Government, has much less power than the former Bundesrat, and that the Chancellor and Cabinet are responsible to the Reichstag alone, means that the policy of the Government is on the whole centralist: the interests of the States do not play such

¹ Art. 17.

² Session 24 February 1919, Heilfron, *op. cit.*, p. 679.

an important part in the government of the Reich as in the time of the Empire.

The legislative functions of the Central Government have been considerably increased. A distinction is drawn between those spheres in which the Reich has exclusive jurisdiction; those in which it has concurrent legislative authority, the States being allowed to legislate so long as, and in so far as, the Reich does not make use of its powers of legislation; and those in which the Reich has 'normative' legislative authority, having the right to lay down general principles to be carried out in detail by the State legislatures.¹

The Reich has exclusive jurisdiction over foreign affairs, the army and navy, post, telegraphs, and customs. The administration of the whole transport system has become a function of the Central Government. The ownership of all railways and waterways 'that serve as means of general public communication' shall be acquired by the Reich. Such railways shall be administered as a single transport system and as an 'independent economic enterprise that shall defray its own expenses'. The Reich may build new railways deemed necessary for the public service, even against the opposition of the States whose territory they traverse. In the future such railways may not be built except by the Central Government or with its consent.

As in the old Constitution of 1871 the Reich has jurisdiction over civil and criminal law. By the new constitution its powers have been extended to include the regulation of labour conditions and social questions, such as insurance, poor relief, and the 'protection of maternity, infancy, childhood, and adolescence'. It may lay down general principles in regard to religious bodies and schools, and the consti-

¹ Arts. 6-11.

tution in fact takes the first step in this direction. Further, it may legislate in regard to commerce, trade, industry and mining, and the socialization of natural resources or business enterprises. Moreover, the Reich has the right to veto any State law dealing with socialization, if such a law affects the well-being of the whole population of the Reich. In spite of the violent opposition of the States the constitution establishes the principle of the financial sovereignty of the Reich. It can take possession of all sources of revenue with the reservation that 'if the Reich claim any source of revenue which formerly belonged to the States it must have consideration for the financial requirements of the States'. The Reich also may lay down general principles in regard to the financial legislation of the States. This was considered necessary, since otherwise the States in attending to their own needs might drain sources of revenue needed by the Reich. The Central Government is given the right to legislate in regard to questions of public welfare and the protection of order and public security; it shall do so 'to the extent that it shall become necessary to pass uniform legislation'. This phrase was inserted in deference to the opposition of the States; it is implied that the Central Government will not interfere in these matters unless the States fail to deal with them adequately. It will be seen that the legislative competence of the States as it remains to-day is by no means large.

The authority of the national over State laws is ensured.¹ The laws of the Reich are supreme over the laws of a State which conflict with them. Disputes are decided by the Supreme Judicial Court, but this court cannot give judgement as to whether the laws of the Reich are contrary to the constitution or infringe State rights. Under the Empire

¹ Art. 3.

all laws, including those of the Imperial Government, were executed by the State officials; according to the new constitution the Reich has its own administrative service throughout all Germany to execute those laws that belong to its exclusive jurisdiction. In so far as the laws of the Reich are to be carried into effect by the State authorities the National Cabinet may issue general instructions, and it has the power to send commissions to the central authorities of the States, and with their permission to the subordinate State authorities, to supervise the execution of national laws.

The new constitution has in fact done so much to strengthen the power of the Reich against the States that doubt has been expressed 'as to whether the German Republic should now be called a federation of States (*Bundesstaat*) with strong national central authority or a unified State (*Einheitsstaat*) with strong territorial decentralization'.

If we take as the definition of a federal State that the member States must exercise certain powers in their own right and not as derived from the federal constitution, or that certain powers, and especially their territorial rights, cannot be modified without their own consent, then the German Republic is undoubtedly a unitary State. The member States, or 'Länder' as they are termed, derive all their powers from the constitution of the Reich. These can be modified by a constitutional amendment. For the passage of such an amendment a vote of the Reichstag or of the whole people in the referendum is necessary; the Reichsrat, representing the interests of the States, has only a consultative voice. Moreover, the actual territory of a State can, as has been seen, be altered in certain cases without its own consent.

Nevertheless, experience so far has shown that the Central Government has not the power to exercise all the rights

entrusted to it by the constitution. It would in practice be impossible to dismember any of the great States, Prussia, Bavaria, or Saxony. The ineffectual attempt to divide Prussia shook the very roots of the Commonwealth. Bavaria has consistently maintained an independent attitude and has shown herself reluctant to conform with the demands of the Government at Berlin. The Central Government has been able to maintain its authority only by great moderation in the exercise of its legal powers. The particularist tendency, the feeling of immediate loyalty to the member State, is still stronger than the actual text of the constitution would imply.

In Eastern Europe the fate of the lands that now constitute German Austria remained in doubt for some time after the disintegration of the former Austro-Hungarian Empire. At one time it seemed possible that a new union or federation would be formed in which Slavs, Germans, and Magyars would join on equal terms.

Such a Danubian Federation was made impossible by the opposition of the Czechs and Yugoslavs, who demanded nothing short of complete national independence, and by the hostility of Italy, who would brook no revival in any form of the Habsburg Empire which it had been her prime object to destroy. The German Austrians claimed that it was impossible for them to establish a separate State. Vienna had been the industrial and economic centre of the whole Danube basin; she was far too large to be maintained by the German lands alone. Cut off from her natural markets and sources of raw material by the new hostile States, German Austria could never become economically self-supporting. These arguments undoubtedly carried weight, and practical proof of their validity was given by the deplorable condition of Vienna in the period following the collapse of the Habsburg rule.

Nevertheless opposition among the Allies to any considerable accession of territory to Germany was so strong that the demand of the Austrians for union with Germany was refused and German Austria was established as a separate State.

The Austrian Federal Union consists therefore of the remnant of the old Empire that was left over when the national States had been established. The new State consists of highly divergent social elements, and the work of organizing a system of government was fraught with grave difficulties. Vienna and Wiener-Neustadt are highly developed industrial districts; the rest of the country, by far the largest in actual area, is thinly populated, mountainous, and agricultural.

As soon as the revolution broke out antagonism became apparent between the proletariat of Vienna and the peasants of the provinces. Vienna would have established the dictatorship of the proletariat. The peasants supported the revolution only in so far as it meant the overthrow of the old autocracy and the triumph of radical individualistic democracy. Vienna was dependent for its food-supply upon the provinces; it could not coerce them, and it could not afford to estrange them. Only with great difficulty and by the exercise of great care and tact was accord preserved between the revolutionary Government in the capital and the National Councils of the various provinces.

The Socialists in Vienna were in favour of centralization and of the requisition and control of the resources of the country for the good of the whole community. Any attempt to enforce such a policy would have brought the triumph of reaction in the provinces and would have led to their separation from Vienna. As a result it was inevitable that the new State should be organized on a federal basis. The constitution represents a compromise between the

centralizing tendency of the Socialists of Vienna and the particularism of the provinces.

In effect, however, the Socialists were able to obtain the substance of their demands. In its form and terminology the constitution adheres strictly to the federal principle, but the actual powers of the member States as against the Central Government are not greater than those of self-governing provinces in a unitary State.

The Austrian Federal Union¹ consists of eight component States.² The problem of Prussia in the German Reich is on a small scale reproduced by the problem of Lower Austria in the Austrian Bund. Lower Austria contains half the population of the whole country. It has therefore for some purposes been considered as constituting two separate States.³ The Landtag is divided into two curiae, the one consisting of the deputies elected by the State exclusive of Vienna and the other of the deputies elected by the city of Vienna. A kind of dualism is established between these two divisions of the State. The two curiae meet as the Landtag of Lower Austria to exercise the power of legislation in matters common to the whole State; in matters not common to both they act separately—‘each of the two divisions of the State has the status of an autonomous State’.⁴ This solution was proposed by the Social Democrats, who were anxious that Vienna, the stronghold of the working classes, should be raised to the position of an independent province.

State boundaries cannot be altered except by a concurrent constitutional law of the Federal State and of the State affected.⁵

Nevertheless the power of the Central Government as

¹ Art. 2.

² Arts. 3, 34, 108–14.

³ Art. 108.

⁴ Art. 10.

⁵ Art. 3.

against the member States is in some ways stronger even than in Germany. The Federal Constitution prescribes in outline the form of the constitutions of the States. The 'Landtag' must be elected 'in accordance with the principle of proportional representation by the equal, direct, secret, and personal suffrage of all Austrian citizens of both sexes'. . . . 'Limitations upon the right to vote or to be elected must not be more restricted than in the regulations for election to the National-rat.'¹ The executive Government of every State must be chosen by the Landtag.² The Federal Ministry may impose a suspensive veto on any State law and may dissolve the Landtag with the consent of two-thirds majority of the Bundes-rat.³ The most important spheres of legislation are reserved to the Central Government. A distinction is made between those subjects in regard to which the Federal Government has both legislative and executive control;⁴ those in regard to which it legislates and the States have the power of execution, subject to federal supervision;⁵ and those over which the Federal Government has no power of execution and can legislate only as regards 'fundamental principles'.⁶

The Federal Government has almost complete control over national, State, and local revenue.⁷ The sphere of independent action of the States is therefore reduced to a minimum.

It will be seen that the new constitutions, even where they have adopted the Federal system, do not show any marked originality in the method in which they have applied it. The machinery of Federal government has been satisfactorily

¹ Art. 95.

² Art. 101.

³ Arts. 98 and 100.

⁴ Art. 10. Art. 102 deals with the administrative competence of the Federal Government.

⁵ Arts. 15, 16.

⁶ Art. 12.

⁷ Art. 12.

worked out in Switzerland and America; its adoption or rejection, the extent to which power is concentrated in the Central Government or remains with the member States, is in each case a political rather than a constitutional problem. The general tendency in the new constitutions, as far as one exists at all, is to strengthen the sense of unity in the State, even at the risk of arousing violent opposition amongst certain sections of the people. This appears to be due partly to the strong feeling of nationality in those countries that have been emancipated from foreign rule, and seek every opportunity of expressing the sense of national solidarity; and partly to the growth of ideas of State Socialism which favour the interference of the Government in every sphere of life, and discountenance individualism of all kinds, whether on the part of isolated citizens or of separate sections of the nation.

PART III

THE DEMOCRATIC PRINCIPLE

CHAPTER V

POPULAR SOVEREIGNTY

EACH of the new constitutions begins with a preamble stating that the people of the country concerned have given themselves a constitution. 'The German people, united in every respect and inspired by the determination to restore and confirm the Reich in liberty and justice, . . . has given itself this constitution.' 'We, the Czechoslovak nation, desirous to consolidate the perfect unity of our people, to establish the reign of justice in the Republic, to ensure the peaceful development of our native Czechoslovak land, . . . have adopted the following constitution for the Czechoslovak Republic.' The preamble to the Estonian Constitution is particularly reminiscent of that of America: 'The Estonian people with unshaken faith and resolute will to create a State based on justice, law, and liberty, for the defence of external and internal peace, and as a pledge for the social progress and general welfare, liberty, and progress of future generations, has drawn up and accepted through the Constituent Assembly the constitution as follows.' In Poland alone the religious element is introduced: 'In the name of Almighty God!' . . . 'We, the Polish nation, thankful to Providence for freeing us from a servitude of a century and a half, . . . having in mind the welfare of our whole, united, and independent mother country, . . . do enact and establish in the Legislative Sjem of the Republic of Poland this constitutional law.' In Yugo-

slavia,¹ as has already been said, doubt existed as to the legal position of the Assembly; it was uncertain whether the King held his title by virtue of the constitution as drawn up by that Assembly, or whether the State was already established as a hereditary monarchy when the Assembly met. Since all the members of the Assembly except the Croatian People's Party took the oath of allegiance to the King the latter view received a certain legal foundation; the King's authority, it could be said, had existed before the Assembly and before the constitution, and the Assembly shared its legislative power with the King. The framers of the constitution avoided the difficulty by omitting any general preamble or statement of the origin of sovereign power in the State. 'The Government of the Kingdom of the Serbs, Croats, and Slovenes is a constitutional, parliamentary, and hereditary monarchy.'²

Except in the case of Yugoslavia the constitution in each case goes on to state that the people are sovereign; that all the powers of government emanate from them. In Finland alone the idea of popular sovereignty is expressed in a somewhat old-fashioned form which suggests that the people delegate their sovereignty to Parliament: 'Sovereign power in Finland belongs to the people, represented by their delegates assembled in the Chamber of Representatives.'³ The other constitutions make it clear that the sovereignty of the people cannot be delegated, that the people can appoint different organs for the work of government, but that none of these organs are themselves sovereign. The representative assembly, like any other of the organs established, exercises power only by commission from the people. The constitution regulates the various means by which the people have agreed to express their will. 'The German Reich is a Republic.'

¹ Subotić, *op. cit.*

² Art. 1.

³ Art. 2.

'The political power emanates from the people.'¹ 'The people are the sole source of State power in the Czechoslovak Republic.' 'This constitutional charter determines through what organs the sovereign people shall express their will in laws, provides for the execution of these laws, and guarantees the people their rights and liberties. Such limitations are imposed upon these organs of government as shall preserve to the people all rights guaranteed by this charter.'² 'The Prussian Constitution declares that the sovereignty of the State resides in the whole people. 'In accordance with the provisions of this constitution and of the constitution of the Reich, the people shall express their will directly through popular suffrage (popular initiative and popular referendum and popular election) and indirectly through the agencies established by the constitution.'³

The Estonian Constitution is interesting because it expresses the idea of popular sovereignty in its most absolute form. The people are sovereign, but the term 'people' includes all the citizens of the State, not only those who enjoy the political franchise. 'The supreme executive of State power in Estonia is the people itself, *through the medium* of the citizens having the right to vote.'⁴ It is interesting that the Estonians should have made this distinction, since the franchise in that country is particularly wide.⁵ Every man and woman who has arrived at the age of twenty and has enjoyed Estonian citizenship for one year has the right to vote. Unless we include minors in the term 'people', the only categories that are excluded are those who have legally been pronounced lunatics, or idiots, and the blind, deaf mutes, and 'persons considered as wasters when they have been put under

¹ Art. 1.

² Art. 1, Czechoslovak Constitution.

³ Arts. 2 and 3.

⁴ Art. 27.

⁵ Arts. 27 and 28.

guardianship'. The distinction, however, is perfectly logical; it is similar to that formerly recognized in France between the active and inactive citizen. Universal suffrage is only a comparatively modern device; all benevolent forms of government have gained their sanction from the active support or tacit compliance of the people. The term 'people' does not imply only those who have political powers; it includes all who enjoy civic rights and are protected by the ordinary laws and the ordinary courts.

That the ordinary legislature in these countries is not legally sovereign in the sense that the English Parliament is sovereign is manifest from the fact that it is in every case bound by the terms of the constitution. 'In Germany political power shall be exercised in matters pertaining to the Reich through the organs of the Reich *on the basis of the national constitution.*'¹ 'In Estonia State power cannot be exercised otherwise than on the basis of the constitution and the laws passed *in accordance with the constitution.*'² In Czechoslovakia³ and Lithuania⁴ it is specifically stated that laws contrary to the constitution are invalid. Nevertheless it is in Czechoslovakia⁵ alone that a Constitutional Court has been

¹ Art. 5.² Art. 3.³ Art. 1, Introductory Law.⁴ Art. 3.

⁵ Arts. 2 and 3, Introductory Law. The Constitutional Court consists of seven members, two of whom are appointed by the High Court of Administration and two by the High Court of Justice; the two remaining members and the Chairman are appointed by the President of the Republic. The court judges (a) whether a supposed constitutional law really has the character of a constitutional law; (b) whether an ordinary law is in conformity with the constitution. It decides also whether the measures taken by the permanent committee are constitutional.

It should be noticed that the procedure of the Constitutional Court in Czechoslovakia is in many respects different from that of the Supreme Court in America. Judge-made law is not known on the Continent as in

established to decide whether the legislation of the Republic or of the Diet of Carpathian Ruthenia is in conformity with the constitution. The lack of such a court is particularly noticeable in the German Federal State. The supreme judicial court can decide whether laws of the member States conflict with the laws of the Reich, but there is no means of declaring a law of the Reich invalid because it encroaches on the powers reserved by the constitution to the member States.¹ In Estonia the supreme judicial tribunal, the State Court, has declared its competence to decide on the validity of laws, in the same manner as the Supreme Court in America. There is no direct provision to this effect in the constitution, but

England and in America. The Supreme Court in America does not judge directly on the constitutional nature of a law; if it considers a law unconstitutional it simply ignores it. The principle of a Bill is not declared unconstitutional, but when a particular case is brought before the Federal Courts it is judged on the strength of their interpretation of the constitution. Laws may therefore remain in force for years before their validity is challenged. In Czechoslovakia the Constitutional Court does not judge particular cases. The validity of a law may be challenged by the Supreme Court of Justice, by the Supreme Administrative Court, by the Chamber of Deputies, by the Senate, or by the Diet of Carpathian Ruthenia. The court then judges directly on the validity of the law in question. The decision must be carried by an absolute majority of the members. If the verdict is against the law the President orders a notice to this effect to be published in the *Journal of Laws and Decrees*. From the date of the publication of the verdict the law is considered annulled. The validity of a law can therefore only be challenged by the competent authorities, and this must be done during the first three years after its promulgation. See Édouard Jolly, *Le Pouvoir législatif dans la République Tchécoslovaque*, pp. 128-30.

A Constitutional Court has also been established in Austria; it judges the validity of Federal and State Laws. It may act on its own initiative or on that of the Federal or of a State Government (Arts. 137-48).

¹ Art. 13.

the State Court bases its action on the clause which proclaims the constitution to be the 'unshaken rule of action of the State Assembly'.¹

The distinction between constitutional and ordinary laws is recognized in all these countries. In most cases an attempt has been made to give stability to the constitution by requiring a larger majority for the passing of a constitutional amendment than for an ordinary law, both in the representative assembly and at the referendum when the constitution provides for a popular vote.

In Germany² a constitutional amendment requires a two-thirds majority in the Reichstag and at least two-thirds of the total legal number of members must be present at the time of the vote. Decisions of the Reichsrat in favour of a constitutional amendment also require a two-thirds majority. When a constitutional amendment is referred to a popular vote the consent of a majority of the qualified voters is necessary. If the Reichstag overrides a decision of the Reichsrat the Reichsrat can within two weeks demand an appeal to a referendum.³ In Czechoslovakia a constitutional law must be passed by a three-fifths majority of both Diet and Senate.⁴

The highly democratic constitutions of Latvia⁵ and Estonia⁶ have by the use of the automatic referendum given expression to the theory that the fundamental constitutional law must be the direct outcome of the will of a sovereign people. In Lithuania⁷ a fraction of the people can demand a referendum on all proposed constitutional changes. In Yugoslavia,⁸ if any proposal is made to change the constitution, the

¹ Art. 86.² Art. 76.³ Arts. 33 and 42.⁴ Art. 75.⁵ Art. 88.⁶ Art. 103.⁷ Arts. 125-6.⁸ *Finland im Anfang des XX. Jahrhunderts*. Herausgegeben im Auftrage des Ministeriums der auswärtigen Angelegenheiten, VI., Staatswesen.

Diet is dissolved and a new Assembly chosen, with authority to deal only with the proposed constitutional change. The assent of the King is necessary if any such change is to become valid. In Finland the rules of procedure provide that at the third reading of a constitutional law the project must either be dropped or postponed for decision until after the next elections. When brought before the new Rikstag the law must either be rejected or accepted as it stands; further amendment is not possible. The Rikstag can however decide at once on a measure for revision of the constitution if such a measure is declared urgent by a five-sixths majority. In either case, whether before a new Rikstag or as the result of a declaration of urgency, a two-thirds majority is necessary to pass a constitutional amendment. In Poland the question of constitutional amendment aroused lively controversy.¹ The constitution had been drawn up by a National Assembly in which the minorities were not represented in accordance with their real strength. It was feared that these minorities, together with the parties of the left, might one day come to power and alter the constitution. The Government parties therefore proposed that for constitutional changes a majority of two-thirds of those voting should be necessary, in the presence of half the legal members in both Diet and Senate. Every twenty-five years, and for the first time in ten years, the Diet and the Senate should meet in National Assembly with power to alter the constitution by an ordinary majority. This proposal roused much opposition. Constitutional changes would have been made almost impossible for ten years to come, since the majority parties

¹ Walter Schatzel, 'Entstehung und Verfassung der polnischen Republik', *Jahrbuch des öffentlichen Rechts*, 1923. Also Potulicki, *op. cit.*, pp. 79-80.

themselves, considering the strength of the extreme left and the minorities, could not hope for a two-thirds majority. The final draft therefore contains a special provision which provides that the second Diet called in conformity with the constitution is empowered to decide on a constitutional change by a majority of two-thirds in the presence of half the members. The assent of the Senate is not necessary. Every twenty-five years the Senate and Diet meet in National Assembly with power to alter the constitution by ordinary law.¹

¹ Art. 125.

CHAPTER VI

UNIVERSAL SUFFRAGE AND PROPORTIONAL REPRESENTATION.

IN accordance with the democratic principle sovereignty is divided equally among the whole body of citizens: the citizens express their sovereignty by the right of political franchise. The new constitutions have with one accord adopted the principle of equal universal suffrage. The right to vote is the inalienable right of every citizen; the people must exercise their sovereignty directly, not through the medium of certain classes, the more intelligent or wealthier members of the community. Every attempt has therefore been made to establish as wide a suffrage as possible.

Before 1918 women's suffrage had been adopted only in certain States of Australia, in Norway, in Denmark, and in Holland.¹ In England, after a prolonged struggle, the right to vote was in 1918 given to women with certain restrictions.² During the war a remarkable change in public opinion had taken place. It was realized that since women had shown themselves able to bear so large a share of the national burdens in public as well as in private life they should be admitted also to the political councils of the nation. Since then the theory of woman suffrage has been generally accepted. The new constitutions give the vote to women on the same conditions as men. No special age or property qualification is necessary.³ In Yugoslavia⁴ alone the constitution does not

¹ Esmein, *Éléments de droit constitutionnel*, p. 361.

² Representation of the People Act, 1918.

³ e.g. German Constitution, Art. 22; Polish Constitution, Art. 12.

⁴ Art. 80.

directly give the vote to women, but provides that the question shall be settled by future law. There seems to have been no strong feeling either for or against the adoption of women's suffrage. In the other countries it was accepted as self-understood.

The age qualification in most of these countries is low. In Finland¹ voters must be twenty-four; almost all the other new constitutions prescribe twenty-one years;² in Germany and also in Estonia, in spite of the obvious objection to the granting of the suffrage to those who had not yet reached their legal majority, the age qualification was fixed as low as twenty. Disqualifications are in all cases reduced to a minimum. The right to vote is denied only to physical or mental incapables, and to those who have been deprived of their civic rights by a court decision; except in Finland,³ bankrupts and paupers retain their right to vote. Soldiers under colours are temporarily disfranchised. The German electoral law contains a special provision allowing the right to vote to persons imprisoned for political reasons.⁴

Where the constitution provides for the use of the referendum or for the election of the President by the whole people the political franchise for these purposes is the same as for elections to the popular representative assembly. In all cases voting is by secret ballot.

In conformity with the same democratic principle that has made the franchise so wide, the new constitutions have put but few limitations on the eligibility of citizens to election for the popular assembly. All property qualification is

¹ Art. 5, Organic Law of Rikstag.

² e.g. Yugoslavian Constitution, Art. 70; Czechoslovak Constitution, Art. 9.

³ Art. 5, par. V-VII, Organic Law of Rikstag.

⁴ Brunet, *The German Constitution*, p. 109.

unknown. A somewhat higher age qualification is in most cases imposed; in Czechoslovakia¹ and Yugoslavia² candidates must be thirty, in Germany³ and Poland⁴ twenty-five, in Lithuania⁵ twenty-four, and in Finland,⁶ Latvia,⁷ and Estonia⁸ all electors are eligible. Apart from the question of age, all electors in these countries are eligible, not excluding soldiers and sailors on active service who are temporarily disfranchised, and civil servants. The constitutions of the nineteenth century, in imitation of English practice, forbade the election of all servants of the State with the exception of ministers. The object was to preserve the purity of the administrative services from political bias and the independence of members of Parliament from external influence. The removal of these prohibitions in the new constitutions is considered to be theoretically in accordance with the democratic principle, since it frees the officials from a serious political disability. In some of the constitutions, notably in Czechoslovakia,⁹ Poland,¹⁰ and Yugoslavia, certain reservations are made. In Czechoslovakia and Poland officials are given leave of absence during the term of their parliamentary service. In Czechoslovakia certain officials, the prefect, the head of a district, members of the electoral tribunal and of the Constitutional Court, cannot be elected. No member can be appointed to the civil service until a year after the expiration of his mandate. In Yugoslavia¹¹ officials of police and of the financial departments and of the department of Agricultural Reform cannot stand for election unless they have given up their functions a year before. Other officials cannot stand

¹ Art. 10.

² Art. 72.

³ Brunet, *op. cit.*, p. 111.

⁴ Art. 13.

⁵ Art. 24.

⁶ Art. 6, Organic Law of Rikstag.

⁷ Art. 9.

⁸ Art. 37.

⁹ Art. 20; also Jolly, *op. cit.*, pp. 38, 39.

¹⁰ Arts. 16, 17.

¹¹ Art. 73.

in constituencies in which they hold any official position. Ministers and members of the educational profession can keep their official position even though elected. Civil servants 'may not use their official position and power for party purposes'. It is feared, however, in some quarters that officials who are elected may neglect their administrative duties, and that higher officials and ministers may be tempted to give advancement to those of their subordinates who help them in their political election.

The admission of officials to eligibility for the Assembly in Yugoslavia has particular historic interest. According to the Serbian Constitution of 1869 the head of the State had the right to appoint one quarter of the members. According to the electoral law of 1870 officials who were appointed as Government nominees lost their mandate as soon as they ceased to be officials. The Government therefore had complete control over these appointed members, and could use them to maintain its majority.¹ When the new constitution was drawn up in 1901 the system was defended by the argument that place must be found in the Assembly for a sufficient number of capable educated men of affairs. The greater number of the electorate were illiterate; the popularly elected members were almost all peasants: a chamber composed entirely of such members would be incapable of carrying on the complicated and difficult work of government. The constitutions of 1888 and 1904 applied a different solution. The object was to ensure that a certain number of qualified members were returned. No party list was allowed to stand unless it contained the names of at least two persons who had received higher education and passed certain

¹ M. J. Peritch, 'Étude sur la nouvelle Constitution du Royaume de Serbie', *Bulletin de la Société de Législation comparée*, 1902-3, pp. 268-9.

examinations. The same system was adopted in the electoral law for the Constituent Assembly of Yugoslavia. The new constitution of Yugoslavia provides for only one single category of members, but officials, with the restrictions mentioned above, may be elected. It was argued that it would be impossible, amongst a largely illiterate people, to maintain the necessary level of intelligence and ability in the Assembly, if the whole educated class of civil servants were excluded.¹

For the elections to the popular Representative Assembly the new constitutions all prescribe direct election on the principles of proportional representation² 'or with representation of minorities'.³ The triumph of the theory of proportional representation is indeed remarkable. Before the war it was in Europe applied only in a few of the smaller States. Since the war it has been generally adopted on the Continent, and has been included almost without discussion in all the new constitutions. In Germany the reporter, when laying before the Assembly the final draft of the electoral law, was able to declare⁴ that 'it has everywhere become apparent that the introduction of proportional representation, as of women's suffrage, has been considered so self-understood that no serious suggestion has anywhere been made to dispense with these reforms'.

The arguments in favour of proportional representation are too well known to need repetition here.⁵ The so-called majority system leaves to chance the representation of minorities. 'It leads to the oppression of one part of the nation by the other, under the pretext that one is

¹ Yovanovitch, *op. cit.*, pp. 106, 108.

² e.g. German Constitution, Art. 22.

³ Yugoslav Constitution, Art. 69.

⁴ Heilfron, *op. cit.*, p. 358.

⁵ e.g. Duguit, *Traité du droit constitutionnel*, vol. ii, pp. 571-9.

able to muster a few more votes.’¹ The size of the majority party in Parliament is far greater than is warranted by the number of its adherents in the country. In each constituency the minority is completely without representation. The worst evil of all is that it is even possible for a minority of the nation to return a majority of the elected Assembly. Decisions in Parliament must be taken by majority vote, but Parliament cannot act by commission for the nation unless it represents the nation as a whole and reflects every shade of opinion found among the people. ‘La délibération à tous, la décision à la majorité.’

Although the theory was universally accepted, the details of its application were in each case left to decision by a separate electoral law. The devices by which the representation of minorities may be secured are numerous; the new constitutions have tended to adopt those that will make the elected chamber as exactly as possible a reflection of the desires and opinions of the whole nation, and will enable every vote to be used effectively, every individual to be represented. The modern tendency is to consider the division of the country into electoral districts as an artificial contrivance, used for the purposes of convenience, but not representing any real or natural division of the electors. Ideally the whole country should be treated as only one constituency; this has in fact been done in some of the German member States. If the division into territorial constituencies is adopted it is necessary, to prevent excessive ‘wasting’ of votes, that this division should in some cases be overridden. Several of the new electoral laws contain provisions according to which surplus votes in each district are transferred for the election of members on a central ticket.

¹ Duguit, p. 572.

The electoral law of Germany¹ has been devised especially to prevent any wasting of votes, to secure to every individual his inalienable right to representation. For the elections to the Constituent Assembly the country had been divided into districts, each on an average returning eleven members. The union of different party lists within the district had been allowed, and this of course prejudiced the chances of parties of no compromise. The seats had been divided amongst the various parties on the D'Hondt system. The method of election for the Constituent Assembly was afterwards severely criticized. The constituencies were considered too large; it was impossible for the member to be known to his electors. Moreover, it was argued that the D'Hondt system is not truly proportional. It allows the stifling of small groups. After the appropriation of seats in different districts a certain number of votes remain which are lost. Parties whose supporters are distributed fairly evenly throughout the whole country suffer much more from this 'wasting' of votes than those whose adherents are crowded together in certain districts. According to the democratic principle all votes should be equal in value. If a certain number of deputies are definitely attached to certain districts, this equality can only be achieved if in each constituency the proportion of actual voters to the number of deputies returned is equal. It is not enough to ensure that the proportion of the population or of the enfranchised citizens to the number of deputies is the same in each constituency. On the basis of the elections to the Constituent Assembly it was calculated that the percentage of the enfranchised citizens who exercised their right to vote varied in different districts from 50.4 to 88.8. The number of votes necessary to obtain the return of a member varied in the

¹ Brunet, *op. cit.*, pp. 103-109.

proportion of 50:324 in West Prussia (Walkreis 2) to 98:761 in Potsdam.¹

To avoid such discrepancies it was decided that elections for the Reich should be organized on a system similar to that which had been adopted in Baden. According to the new Baden Constitution 'Each party or group of electors shall have one deputy for each 10,000 votes cast for the list of candidates. The votes remaining unused in each circumscription shall be totalled for the entire country and distributed in accordance with the foregoing principle. Every remainder of more than 7,500 shall be given one seat.'² The actual number of deputies therefore is not fixed, but depends upon the number of those who take part in the vote.

Three schemes were put forward for the application of this system to the needs of the Reich. The scheme finally adopted entailed a reorganization of electoral districts, according to which each district would be calculated to return about four members. These districts were to be organized in groups. Parties could present lists either in each district or in each group of districts, not in both, and each party would also present a central list or ticket of the Reich. Surplus votes would be transferred directly from the district or group of districts to the ticket of the Reich. This would enable small parties to join together in various districts, whilst big parties, to avoid cumbersome lists, could present a separate ticket in each district.

As a result of the *coup d'état* of Kapp and Lutwitz in March 1920 a ministerial crisis arose, which made an almost immediate election necessary. No time remained for the re-division of the country into districts and the original scheme

¹ Heinrich von Jan, 'Wahlrecht und Volksabstimmung', *Jahrbuch des öffentlichen Rechts*, 1921, pp. 177-221. ² Art. 24, Constitution of Baden.

was modified in certain respects. The idea of tickets for groups of districts was dropped. It was discovered, however, by experimenting with the votes cast for the Constituent Assembly, that if all the surplus votes had been immediately transferred to the ticket of the Reich, eighteen per cent. of the members would have been elected on these central tickets. This was considered to give too much power to the party managers and to infringe the principle of direct election. According to the electoral law as finally adopted the Reich is divided into thirty-five circumscriptions; one member is returned for every 60,000 votes or major fraction of that number, cast for each party list. Groups of districts are provided for, but no special tickets for these groups are allowed. Political parties can declare in advance that they will unite within these groups the whole or part of their district tickets, so that the votes remaining unutilized will be assigned to the district ticket with the largest number of votes. Only after the second redistribution can fractions be given to the ticket of the Reich. If parties do not join district tickets within the group all surplus votes go directly to the ticket of the Reich.

It was feared, however, that the unrestricted use of the ticket of the Reich might lead to the election of a considerable number of deputies who did not hold any definite point of view in regard to general political issues, but represented only certain narrow particular interests.¹ To prevent this, and to give a certain advantage to larger groups, it was agreed that no party should be entitled to a seat by 'joining' its district tickets unless one of its tickets had obtained at least 30,000 votes, and that no party should be assigned on the ticket of the Reich a larger number of members than had been elected for

¹ Heilfron, p. 138.

that party on the district tickets. The object of the ticket of the Reich is not only to prevent the waste of votes, but to enable the parties to obtain the election of candidates of intellectual ability or practical experience who may not have any local connexion or do not wish to enter on an electoral campaign. It entails the corresponding disadvantage that the tie between the elector and representative is made more remote, and greater power is given to the party organizations.

Prussia has adopted a system very similar to that in force in the Reich, but no safeguard is introduced against the return of freak parties. A party too small to win a seat in a circumscription can obtain representation by the union of circumscriptions or on the central ticket.¹

Bavaria has made the experiment of allotting the seats on the basis of the total number of votes cast for each party throughout the whole State. An attempt has also been made to avoid the strictly binding list and to allow complete freedom to the elector. For the elections to the Constituent Assembly the whole of Bavaria was treated as one single constituency. The country was divided into electoral districts, to each of which one or two members were to be allotted. The elector could vote for any one or two members who appeared on any list. Out of the total 180 seats, 163 were then divided amongst the parties according to the total number of votes they had polled throughout the whole coun-

¹ Aubrey, *La Constitution Prussienne*, 17, 74, 80.

The same system has been adopted in Mecklenburg-Schwerin and Thuringia. In Württemberg, Saxony, Anhalt, and Lübeck the number of deputies is fixed; the quota for which a seat is given is decided by dividing the number of votes cast by the number of deputies to be elected. Anhalt and Lübeck are treated as one constituency. Most of the States have adopted the system of strictly binding lists, but in Lübeck the elector can alter the order of candidates on a list.

try. Within the lists candidates were elected according to the votes cast for each individual. The remaining seventeen seats were allotted proportionally to the lists with the largest number of votes. They were to be freely given by the party to hitherto unelected candidates, the object being to counteract the inevitable 'surprises' of proportional representation with free lists.

The object of the system was to allow complete freedom to the elector, to maintain the connexion between the elector and the deputy, and to enable small groups and interests to garner votes throughout the whole land and obtain representation. The fact that the subsequent division of the deputies amongst the different districts caused considerable difficulty and discontent shows that the belief in the reality of the territorial constituency returning its own member is not easily overridden.

According to the new electoral law of Bavaria the seats are divided amongst the different parties by means of an electoral quota. This quota is decided separately in each district. All votes remaining over from the districts are added together for the whole State and divided according to a new quota. If at this point all the seats have not been filled they are given to the lists with the largest number of remnant votes. Fifteen seats are kept vacant; they are afterwards allotted to the parties in proportion to the total number of votes they have received, and are given to candidates on their lists who have not yet been elected. The elector is not allowed to vote for any candidate, but only for one of those standing in his own district. If he does not approve of any of them he can vote for a party as a whole and not for any individual. He then strengthens his party, but has no influence on the order in which the candidates are placed on the list. The order of candidates is

decided by a separate count after the number of seats has been attributed to each list.

The idea of the central ticket or 'liste d'état' has been borrowed from Germany by Poland.¹ It is used in that country not as a means to prevent the waste of surplus votes, but solely to raise the intellectual level of the Assembly and to obtain the election of men of special knowledge or experience who may be unwilling to fight an election in a constituency. As in Germany, the system has been criticized on the grounds that it may give too much power to party managers. According to the electoral law of 28 July 1922 the country is divided into 64 circumscriptions; each elects from four to ten deputies; Warsaw, which constitutes a separate circumscription, elects fourteen members. The total number of deputies is 444; 372 are chosen from the lists of the circumscriptions and 72 from the central lists. The electors vote only for lists of circumscriptions; seats are allotted according to the D'Hondt system. Each party when presenting its lists in the circumscriptions can declare itself attached to a central list. The total number of seats obtained by each party are added together. Seats are allotted on the central lists in accordance with these numbers, division being made according to the D'Hondt system.

A still more definite attempt than in Germany was made to give an advantage to the larger groups and to make it more possible to form a parliamentary majority. The necessity for strengthening the larger parties was emphasized by the fact that in the Constituent Assembly fifteen parties had been returned, eight of which numbered nineteen-twentieths of the total membership.² According to the electoral law, no party

¹ Antoine Peretiatkowiez, *La Constitution Polonaise*, pp. 10, 11.

² See list of parties in Potuluchi, *op. cit.*, pp. 14, 15.

can benefit by the central lists unless it has obtained the election of members in at least six constituencies.

In Czechoslovakia¹ the exercise of the political franchise is looked upon not only as a right, but as a duty. All registered voters, not prevented by age, ill health, or other sufficient reason, who do not record their votes are liable to a fine or to imprisonment for one month.² The system in force is that of strictly binding lists; the division of seats is made by an electoral quota; three scrutinies, if necessary, are held. The elector votes by choosing one of the party lists and placing it in the urn. The number of ballot-papers given for each party is counted; the fact that these have been tampered with or names erased does not make any difference. The total number of votes cast in each constituency are added and divided by the number of candidates to be returned. This figure constitutes the electoral quota. The number of votes cast for each party are divided by the electoral quota in order to ascertain the number of deputies returned from each. The seats are assigned in the order in which the candidates appear on the list. If all the seats are not filled at the first scrutiny, the parties present lists of candidates to a central committee; these must be candidates proposed but not elected on the first scrutiny. All surplus votes are then added together, and a new quota is found by dividing this number by the total number of seats still to be filled, plus one. No account is taken in the second scrutiny of party lists that have received less than 20,000 votes or less than the first quota. If all the seats are not yet filled they are allotted to the parties who after the second scrutiny have the largest remainders. In the third

¹ Jolly, *op. cit.*, pp. 49-60; V. Joachim, *The Constitution of the Czechoslovakian Republic*, pp. 3-6.

² Jolly, *op. cit.*, p. 60.

scrutiny seats are allotted only to parties who have reached the electoral quota in the first scrutiny; it does not matter that they have not reached the quota in the second round. The use of the electoral quota gives a slight advantage to large parties, since quite small minorities are altogether ignored.

In Yugoslavia¹ the use of the electoral quota has been introduced with this special purpose. In each circumscription the total number of votes cast is divided by the number plus one of the deputies to be returned. Party lists that have not obtained the quota are not considered. After this first scrutiny the distribution of seats is made in accordance with the D'Hondt system. If no list has obtained the first quota, the first scrutiny is altogether ignored and the seats are apportioned amongst all the lists. If in a circumscription electing six or more than six deputies one list only has obtained the first quota, the next largest is also considered. In the same way in a circumscription electing nine or more members the next largest list is also considered if only two have obtained the first quota. Except in the exceptional cases mentioned minorities are not considered unless they obtain enough votes for the first quota.

In Latvia² and Estonia the distribution of seats is made in accordance with the D'Hondt system. In Latvia the free list has been introduced for parliamentary as well as municipal elections. The elector not only may express his preference for certain individuals on the party list, but he may add the names of members of other parties (*panachage*). A double count takes place: the first to decide the number of deputies

¹ Yovanovitch, *op. cit.* pp. 119-23.

² Max M. Laserson, 'Das Verfassungsrecht Lettlands', *Jahrbuch des öffentlichen Rechts*, p. 260.

electd from each list, the second to decide between the particular candidates on each list.

In Lithuania¹ the seats are distributed by the use of an electoral quota. The total number of votes cast is divided by the number of deputies to be returned. This electoral quota divided into the number of votes cast for each party list gives the number of deputies to be returned from each. If all the seats are not filled at the first scrutiny those remaining are allotted to the parties with the largest remainders. No party may propose on its list more than half the number of candidates that are to be returned from the district, but, since the electoral law allows the union of lists, this is not really a handicap on large parties, although it allows a certain amount of freedom and elasticity within the party.²

In Finland the electoral law, passed at the same time as the organic law of the Diet in 1906, is still in force. It provides for a highly complicated system of proportional representation. The constituencies are large, returning from six to twenty-three members, the average being thirteen. No list, however, may contain more than three names; the elector may vote only for one list, but he may change the order of the candidates on the list. Obviously large parties could not be restricted to the nomination of only three candidates. Parties therefore are allowed to form compacts by joining lists; in practice large parties issue a series of lists containing at least as many members as they hope to return. The object of the system is to allow as much freedom as possible to the elector. Small groups of voters united on a transitory or particular local interest may nominate an independent list of their own, and within the ranks of the larger parties the compacts of

¹ Electoral Law of Lithuania, Arts. 75, 76.

² *Ibid.*, Arts. 41, 78.

small lists allow regard to be paid to local or special interests. A single name may, however, be entered on any number of lists, and although the voter may change the order of candidates he may vote only for one complete list. This makes it possible for the party managers to carry an unpopular candidate by placing him on lists headed by more popular candidates.¹

The method of counting and distributing the seats is exceedingly complicated. Three calculations are necessary: one to determine the order of candidates on the lists, one to determine the order of candidates within the compact, and a third to determine the order of candidates within the district, which in effect determines the distribution of seats. The whole procedure is so involved that the result of an election is usually not announced for two or three weeks after the vote has been taken.

¹ J. Dech and G. von Wendt, 'La représentation proportionnelle et la récente loi électorale du grand Duché de Finlande', *Cahiers de la Quinzaine* (Paris), 9^e série, 4^e au 7^e cahier, 5^e cahier de la 9^e série. Also Humphreys, *Proportional Representation*, pp. 314 et seq.

CHAPTER VII

THE ELECTORAL SYSTEM AND POLITICAL PARTIES

A GENERAL discussion of party politics under the new constitutions is outside the sphere of this book. The object of the present chapter is only to trace the effect of the electoral system on the formation of political parties, and to investigate the extent to which the admittedly unsatisfactory condition of party politics might be remedied by electoral reform.

All the new electoral laws have adopted some kind of list system; the greater number adhere to the principle of strictly binding lists. The elector may vote only for one party list and for the candidates in the order in which they have been placed by the party leaders. This system has been adopted because it is the only one that makes possible the combination of a comparatively simple procedure with one that secures the minimum of wasted votes. It has the disadvantage that the freedom of choice of the elector is severely curtailed and the influence of party managers increased. In Germany this disadvantage was pointed out in the Assembly, but all agreed that the individual suffered much less than under the majority system, according to which, unless he belongs to a majority party, his voice is entirely lost.¹ The fact remains that an elector cannot express his preference for an individual without voting for the whole party list. The choice of the actual candidates becomes the function of the party organization; the tie between the elector and the

¹ e.g. Deputy Koch, Heilfron, p. 358.

deputy is less direct; the responsibility of the deputy to his constituents is decreased, but his dependence on the party organization is increased. This lack of freedom on the part of the elector is felt very strongly in Czechoslovakia, where the elector is compelled by law to vote, and must give his adherence to a whole list as it stands, although it may contain individuals in whom he has no confidence. His vote does not become invalid even if he tampers with the list or crosses out the names of individuals of whom he disapproves. A candidate cannot stand on his own: he must be put forward by a recognized party organization. 'The parties are the real determining forces of the elections. Without them . . . the electoral system altogether disappears. . . . The law ignores the candidate. It recognises only the list of candidates as an indivisible whole.'

One of the chief arguments in favour of proportional representation has always been that it is impossible for Parliament to come to a decision in accordance with the will of the nation, unless all opinions are represented, unless Parliament as a whole can hear every point of view, and then, after full consideration and discussion, decide upon the line it will take. The function of Parliament is twofold: to deliberate and to decide. Under the majority system, it is maintained, deliberation is unprofitable, since one section of opinion is vastly over-represented and others may not be represented at all. In practice the list system of proportional representation, as a result of the power it gives to party organizations, makes deliberation in Parliament even more unprofitable. The deputy is not free to express his own opinion and then, open to conviction, to listen to the argument of others; he is tied down by the previous decision of his party as a whole, he must give his vote with his party whatever his private opinion may

be on the particular point in question. All the new constitutions, like those of the nineteenth century,¹ contain clauses which state that deputies are representatives of the whole people; 'they must not accept any *mandat impératif*'; they are subject only to their own consciences and 'are not bound by any instructions'.² In practice this provision is entirely ignored. Deputies are responsible to their parties. On all important questions the parties hold separate meetings; the decision arrived at by the majority in the party conclave must be followed by every one of its members. The constitutions do not allow the recall of a particular member, but a deputy who voted against his party would be ejected from the party organization, and, unless he were influential enough to form a new party of his own, he would have no opportunity of re-election. This dependence upon party is a general development of modern democracy; it exists independently of any particular electoral system; but there is no doubt that the list system of proportional representation tends to strengthen the party influence and push the personality of the individual candidate into the background.

Another and perhaps more serious objection to proportional representation is that it leads to the return of a large number of small parties. It is not probable that any two individuals agree entirely on all political issues. It is impossible to represent all these separate opinions; the function of the political party is to group together individuals holding similar opinions and to represent them by a common programme. As soon as even two individuals agree on some com-

¹ Esmein, *op. cit.*, p. 318.

² German Constitution, Art. 21. Also e.g. Czechoslovak Constitution, Art. 22, par. 1: 'Members of Parliament . . . shall not receive orders from anybody.' Polish Constitution, Art. 20; Estonian Constitution, Art. 45.

mon policy a certain measure of compromise must take place; the wider the membership of the party, the wider its programme will become. The degree to which people will be willing to compromise depends upon various circumstances, such as the character of the individual nation and the issues on which it is divided, but the system of representation actually in force will certainly not be without effect on the size and number of the parties returned.

The results of the elections to the Constituent Assemblies already forced upon the notice of statesmen the evil results that might follow from the multiplication of parties. The rather half-hearted efforts apparent in some of the electoral laws to strengthen large parties as against small ones do not by any means go to the root of the problem. In all these countries the number of parties returned is large. In Germany as a result of the elections of December 1924 there were nine distinct parties in the Reichstag, not counting various land unions and other small groups. In Czechoslovakia after the elections in April 1920 the Diet, comprising 276 members, contained fifteen parties, varying in number from seventy-four to one, the average being eighteen. At the elections in the autumn of 1925 there were twenty-nine parties in the field. In Estonia the Parliament of a hundred members contains more than ten parties. In Latvia the number of parties varies from ten to twenty; at the elections of October 1925 there were forty-three parties in the field; twenty-one were returned, several consisting of only one member.

It is not suggested that the electoral system is alone responsible for this multiplication of parties. One of the causes is undoubtedly to be found in the fact that although functional representation, as such, has not been introduced, there is an

ever-growing tendency in all continental democracies to form parties which represent, not general political opinions, but the particular interests of certain classes, and even of certain professions. The multiplication of parties is partly a cause and partly a result of this tendency. An electoral system which makes it impossible for a party to secure representation unless it obtains a considerable number of votes or an actual majority in some constituencies will cause small parties to seek alliance with large ones. A system which makes it possible for all parties, however small, to obtain separate representation will lead to a multiplication of parties. In the end, this means that parties are formed which do not represent a separate point of view with regard to general political questions, but which stand for the attainment of some one particular measure, or represent the interest of some special section of the people. As long as each political party represents a general connected theory of government the number of such parties cannot be large. As soon as material interests are represented the number of possible divisions becomes almost unlimited.

In the countries under consideration, the big division is not now between Liberals and Conservatives but between Bourgeois and Socialist parties; in eastern Europe the Agrarians or Peasants form a third important section standing midway between the other two. Within these three big groups, the first of which represents the capitalists, landowners, officials, and professional classes; the second, the peasantry; and the third, the industrial workers, there are innumerable subdivisions and cross-currents. The division is largest amongst the bourgeois parties, where opinions and interests are more divided than amongst the industrial workers and peasants; the hostility between Conservatives and Liberals is still strong; in

fact, sometimes stronger than between Liberals and Socialists. Outside these main divisions are certain groups of irreconcilables, Communists, and 'Fascisti', who are fundamentally opposed to the democratic State.

In Germany the conservative element is represented by the National People's Party. Although they have accepted the Republic as a temporary necessity the Nationalists are avowedly in favour of a constitutional monarchy. They are religious and anti-Semitic; they advocate a strong nationalist foreign policy, and discountenance the policy of fulfilment. They find their support chiefly among the Junkers, the large industrialists, the officers, and the officials; but Nationalism and Lutheranism win support from all classes. They find a counterpart in the Finnish Coalition, the party of the big landlords, in the Polish National Democrats and National People's Party, in the People's Party in Czechoslovakia, and in the Latvian Christian Nationalists. The Polish and Czechoslovakian conservatives are, however, more definitely religious, and are bound by the tie of Catholicism and the desire to maintain the connexion between Church and State to a much greater extent than are the German Nationalists by the interests of Lutheranism. In the primarily agrarian countries, Yugoslavia and the Baltic States, where there is no native aristocracy and no traditional Conservatism, and where strong Nationalism is common to the agrarian and centre parties, the Conservatives are weak or non-existent. In Poland the land-owning aristocracy form the basis of the conservative parties, but under the leadership of Pilsudski the most violent form of Nationalism has become identified with the Socialist and Peasant parties of the left.

In Germany a small body of extreme reactionaries has broken away from the Nationalists and has formed a separate

organization, the Freedom Party. They had previously formed committees within the Nationalist Party with the object of instigating more vigorous counter-revolutionary action. In 1922 they were given the alternative of dissolving these committees or leaving the party; they choose the latter course. The Freedom Party is definitely opposed to the principles of democracy. Recently they have begun to call themselves 'Fascisti'. They are in close touch with the irregular military organizations, and were connected with the assassination of Rathenau and Erzberger.

In Finland there is a strong party of extreme Conservatives who tend to rely on extra-parliamentary action, and are called by their opponents the 'Bolshevists of the right'. They belong to a secret society, the Jaegar organization, and are violently anti-Russian. They have preponderant influence in the Schutzcorps, a voluntary national guard, which after the conclusion of the civil war was formed out of the remains of the Finnish Legion which had fought for Germany against Russia under General Mannerheim. The object of the corps is to provide for national defence against foreign aggression or against anti-national forces at home. The Jaegar Society has also, during recent years, gained considerable influence in the regular army.

The bourgeois business interest in Germany is represented by the People's Party. Like the Nationalists it is really monarchial, but it differs from them with regard to foreign policy. In other respects the division between the Nationalists and the People's Party is slight; recently a considerable number of the big industrialists have gone over to the Nationalists. In Czechoslovakia the industrial capitalist and bourgeois business interests are represented by the National Democrats. This party is strongly Nationalist and Conserva-

tive. It has been accused of encouraging the growth of anti-parliamentary Fascist organizations.

The German Democrats are the upholders of Liberal democracy. They are not a large party, and find support chiefly amongst the liberal intellectuals. They count in their ranks a considerable number of Jews. Together with the Centre Party they form the liberal democratic centre between the extremes of left and right. They find a counterpart in the Finnish Progressives, in the Polish National Labour Party, and in the Estonian Centre Democratic Bloc (Christian Party and People's Party). In Eastern Europe, however, the 'Centre' is usually taken up by definitely peasant parties.

Allusion has already been made to certain cross-currents which break down the division of parties according to class interests. The most important of these, especially in the Catholic countries, is religion. The German Centre Party, although liberal, is primarily a catholic party. In the other countries the catholic parties are usually conservative. The Polish National Democrats and the Czechoslovak People's Party have already been mentioned. In Lithuania the Christian Democrats, the conservative nationalist party, is strong; it receives support from all classes. In Austria the Christian Socialists are also powerful; the tie of religion is sufficiently strong to unite the radical peasantry and the urban bourgeoisie into one party. In Poland the Catholic workers and peasants form separate parties within the bloc of the right.

In Czechoslovakia, Finland, Yugoslavia, Latvia, Estonia, Lithuania, and Poland, the peasant parties or 'Agrarians' play an important part. They are radical and republican, but not socialistic. They take the place occupied by the Democrats

and Centre in Germany, and have formed the most stable element in most of the Coalition Governments.

In all these countries the majority of the industrial workers are Social Democrats. They are, at least in theory, adherents of the Second International; they advocate the socialization of the means of production and the gradual but complete abolition of the capitalist system. They are not revolutionary, are opposed to violence, and hope to achieve their ends by parliamentary means.

In each case the extreme Socialists have now broken away from the Social Democrats and have formed a separate Communist Party in more or less direct connexion with Russia. The Communists are open propagandists of the class war, and, at least in theory, directly revolutionary. Their actual methods vary considerably from one country to another. In Germany they have recently become more moderate in their methods, although not in their aims. They now participate regularly in parliamentary elections, and take the point of view that revolutionary action should be postponed until the bulk of the working-classes have been converted to faith in Communism and in the necessity for the class war.

In Czechoslovakia the number of Communists is large; in fact, after the elections of November 1926 they were the second largest party in the chamber. It must, however, be observed that the other Socialists are not united. There is a further division between Social Democrats and National Socialists; these two parties together would be considerably stronger than the Communists. Moreover, the Communists in Czechoslovakia win their support largely amongst the ignorant peasantry of Slovakia and Ruthenia, who are in complete ignorance as to their real aims. The organized industrial workers are preponderantly Reformist. The Communists in

Czechoslovakia are, on the whole, moderate in their methods; one of the chief causes of their strength rests in the fact that during the first years of the Republic they were the only native Czech party of opposition. This gave them the character of a syndicate of discontent rather than of a revolutionary organization. Both in Germany and Czechoslovakia the growth in numbers of the Communists and the more practical policy adopted by their leaders have caused dissensions within the party. In Czechoslovakia the extremists have broken away and formed a separate group, the Independent Communists, who advocate immediate revolutionary action.

In the Baltic States the Communists are in more direct communication with Russia and are more distinctly revolutionary.

In Estonia and Latvia they have not figured as a parliamentary party since their suppression after the discovery of the revolutionary plot in 1924. The rising in Riga in December of that year was undoubtedly engineered from Moscow. The number of Communists engaged in the revolt cannot have exceeded two hundred. The native Estonian workmen were apathetic and took no part. The Communists in these countries are attempting to achieve their aims, not by a mass movement, but through the violent action of well-disciplined organizations. They depend almost entirely on foreign support.

In Finland the Socialists are strong; in fact, they have more adherents than any other single party. During the civil war they took the part of the Russians against the pro-German Nationalist element. Since then they have become more moderate and have ceased to be a revolutionary party. They advocate friendly relations with Russia, but are opposed to the establishment of a red terror as in that country. In 1922

the left wing broke away and formed the Communist or Workers' Party. They are definitely revolutionary, and receive instructions and financial support from Russia. In August 1923 the Communist leaders, including members of the Rikstag, were arrested. In January 1924 the Communist or Workers' Party was declared by the High Court to be an illegal body, their avowed aims being equivalent to treason against the Finnish State. The number of native Communists in Finland is greater than in the other Baltic States; it is estimated that they represent about 35 per cent. of the industrial workers. Since legal action was taken against the party they have relied more upon extra-parliamentary action, and are not represented in the Rikstag in accordance with their full strength.

Racial antagonism and local patriotism constitute a second cross-current that breaks through the division of parties according to class interests. In many of these countries political life is complicated by the fact that the national minorities organize themselves in separate parties. This is especially the case in Czechoslovakia, Yugoslavia, Poland, and the Baltic States. In the Baltic States and in Poland, Jews, Germans, and Russians form separate parties. In Yugoslavia there is a German party and two separate Mussulman groups (the Bosnian and South Serbian Mussulmans). In Czechoslovakia the number of the national minorities is considerable. There are separate German, Hungarian, and Polish parties. The Germans are by far the most numerous. After the election of November 1926 they constituted nearly a quarter of the total membership of the Diet. In Finland the Swedish-speaking landowners cannot be considered as a national minority; they participate in the State on entirely equal terms with the Finns. Racial antagonism, nevertheless, is strong. The

Swedes form a separate party. At first they held aloof altogether and refused to co-operate with the Finns. Recently a more moderate element has come to the fore within the Swedish Party. This moderate element advocates the frank acceptance of the fact that Swedes and Finns are members of one State. The Swedish Finns should look upon Finland and not Sweden as their fatherland. Social and economic interests would naturally lead to a coalition between the Swedes and the Finnish Conservatives, but the violent nationalism of the Finnish right has led them on several occasions to attack the language rights of the Swedes. As a result, the Swedes have shown a tendency to seek alliance with the Finnish left.

In Yugoslavia, which is primarily a peasant State, class divisions are not important. Parties are divided almost entirely on the question of centralism or local autonomy. The Democrats and the Radicals (the Serbian Peasant Party) are in favour of the maintenance of the internal unity of the State. The Croatian Peasant Party, and to a certain extent also the Slovenian Clericals, demand drastic constitutional revision and the reorganization of the State either as a federal union or on the basis of wide autonomy for the component parts. For some years the Croatian Peasants refused altogether to recognize the monarchy or the constitution. They absented themselves from Parliament, and their leader Radić indulged in much wild talk of a peasant federal Republic to be established on the Russian model. There can, however, be no doubt that the Croatians were never really in sympathy with the Russian Communists. Their only object is to maintain their local independence against the Pan-Serbs. Recently they have ceased to call themselves Republican, and they are now attempting to attain their ends by parliamentary means and, if necessary, by co-operation with the Serbs. The dis-

inction between the Serbian Democrats and Radicals is mainly one of tradition. In 1924 the Democrats split up into two sections; the Independent Democrats represent the extreme centralist attitude of the Pan Serbs, whilst the bulk of the party has become identified with more moderate opinion. They advocate a moderate measure of decentralization and the suppression of corruption, which had vitiated the administration of Pasić, the veteran Radical leader.

In Czechoslovakia the Slovak People's Party, under the leadership of Father Hinkla, take up a position somewhat similar to that of the Croat Peasants. They have consistently refused to co-operate in any Government except on the basis of wide local autonomy. In Germany local interests are represented by the Bavarian People's Party. Occasionally a small body of Hanoverian autonomists have made their appearance. In Latvia representatives of the Catholic province of Latgalia are organized in a separate series of parties.

The conflicting interests which have been dealt with in broad outline in this summary exist independently of the electoral system; proportional representation enables them to obtain separate representation in Parliament. Moreover many of these groups are divided into innumerable smaller sections, and the political development of the last few years shows a tendency towards ever greater subdivision. As a result the representation of interests is to an ever greater extent forcing itself into Parliament under the cover of representation of opinions.

In Germany independent 'Land Leagues' and 'Peasant Unions' have made their appearance. The small business interest has organized itself into a separate group called the 'Bourgeois Business Party'. In Czechoslovakia the left wing of the National Democrats has broken away and formed a

separate organization, 'The Small Traders Party'. The Reformist Socialists in that country are divided into two parties, the Social Democrats and the National Labour Party. The latter, although in favour of the socialization of industry, are distinctly nationalist; they are drawn chiefly from among the Government employees and intellectual Socialists. Moreover the German minority are not united in one single party, but form a whole series of groups representing the same class divisions as the Czech parties. The hostility between these parties is considerable. Before the elections of November 1926, every attempt to form a united German front was doomed to failure.

The subdivision is greatest in Poland and the Baltic States. In Poland, for instance, the 'Piast Peasant Party' under the leadership of M. Witos is violently opposed to the more radical 'Wyzwolenie', who are adherents of Pilsudski. The 'Piast Peasant Party' is a regular centre group representing the propertied classes and independent farmers. The 'Wyzwolenie' represent the smallholder and landless peasant. They advocate drastic agrarian reform. The conservatives and industrial workers are also much divided. These subdivisions often represent political factions rather than real interests. Since the *coup d'état* of Pilsudski a definite cross-current has made its appearance. Originally he received his support from the Socialists and Radical Peasants. Now all parties show a tendency to split into groups for and against the Marshal. Nationalism wins favour amongst all classes. The conservative domestic policy of Pilsudski has lost the support of some of his Socialist adherents, but there are abundant signs that many of the propertied classes are beginning to look upon him with favour.

In Latvia the Social Democrats are divided into a right and

left group, the right consenting and the left refusing to co-operate in a bourgeois Government. The Catholic eastern province of Latgalia returns four separate parties. The peasants are divided into various groups. Separate parties have appeared representing the 'Devastated Regions' and the 'Landless Peasants'. On the right wing after the elections of October 1925 there was a single representative of the 'House Owners'. In Estonia there are special representatives of Land-settlers, Landlords, and Tenants. The Parliament elected in February 1923 contained one representative of the 'Demobilized Soldiers'. The industrial workers are, excluding the Communists, divided into three sections—the Social Democrats, the Independent Socialists, and the Labour Party. The Labour Party represents a group of moderate reformists who are willing to co-operate with the bourgeois parties.

It must not be supposed that all such parties represent definite opinions or material interests. The difference between these various groups is often slight and ill-defined. They may depend for their existence not on the reality of the interests they represent, but on tradition and the personality of their leaders. It is no uncommon thing for an ambitious politician to break away from his party and form an independent organization of his own.¹ The personal hostility of leaders and the interests of party organizers may prevent the union of groups whose policy is almost identical.

There can be no doubt that proportional representation encourages this disintegration. The result is, of course, directly opposed to the traditional conception of democracy, which

¹ e.g. as the result of a quarrel between M. Prasch and the other Agrarian leaders in Czechoslovakia he broke away from the main party with a small following and formed a separate group, the Conservative Agrarians.

insists that the people, when electing deputies, should bear in mind not their own interests but the common good of all.¹

This impartial attitude on the part of the elector may be an impossible ideal. The advantage of the majority system of representation is that it forces the party leader and, to a lesser extent, every private member to be a statesman rather than a party politician. A large party cannot be held together except by leaders who can produce a general programme of government calculated to win the support of many different sections of the people. Such a leader must show himself capable of grappling with the problems with which his country is faced; he cannot content himself with clamouring ceaselessly for the attainment of some one particular object. Where parties are small and the programme is more narrow and definite, the leader will take a much less tolerant and broad-minded attitude; he will go to Parliament determined to fight to the last for his own particular party and their opinions. He will compromise, not because he has learnt by experience that compromise is necessary if the common good is to be attained, but because he hopes to obtain concessions for his own party in return for assistance given to others. In large multi-member constituencies the candidate will tend to seek the support, not of all classes in a small area, but of one class in a more extended district. The attitude of mind of each individual member is no unimportant factor in the efficient working of the parliamentary system.

As a result of the multiplication of parties, it is difficult to form a stable parliamentary majority. Experience has shown that this is the usual effect of proportional representation. It has been defended by some who argue that in a democracy the work of legislation should progress slowly. Reforms

¹ e.g. Esmein, *op. cit.*, vol. i, pp. 311-12.

should not be introduced until by far the greater part of the nation agree on their advisability. The system which leads to the return of one party with an exaggerated majority makes it possible for that party to push through premature and ill-considered changes. There is, however, considerable danger that legislation which is the result of a compromise among parties may lose all coherence and creative force.

The evil effects of the multiplication of parties are even more apparent in the sphere of executive government. The new constitutions have all adopted the Cabinet system; as will be seen later, the number of parties makes it almost impossible to work this system or to form a strong Government.¹ The strengthening of the executive in these countries has become a vital question; the necessity for devising some means of making the formation of a majority more easy has become so acute that it is possible to trace the beginning of a reaction against proportional representation. It is not easy to illustrate a tendency as yet so new and undefined. So far the attack has been concentrated chiefly on the system of strictly binding lists. It is considered that this method gives too much power to the party managers and increases the number of parties, since enterprising politicians who resent the tyranny of the party machine are tempted to break away and form an independent group.

In Germany suggestions have been made to introduce a modified form of proportional representation based on the transferable vote system. This scheme would involve the division into smaller constituencies and would, it is hoped, make more real the tie between the elector and the deputy.²

¹ See Chapter XIV.

² In 1924 the Cabinet was thought to be preparing a new electoral law on these lines. They declared, however, that there was no time to pass

In Czechoslovakia the opposition to the electoral law seems still to be confined to the system of strictly binding lists and compulsory voting. Proportional representation as a whole has not been attacked.¹ In the Baltic States, and especially in Latvia, there has been a good deal of newspaper agitation against proportional representation. An electoral system similar to that of England has been advocated in some quarters. Politicians are watching developments in Germany. It is hoped that Germany may take the lead in devising some more practicable method of election.

In Poland at the time of the recent constitutional amendment the parties of the right, including the Piast Peasant Party, suggested that proportional representation be altogether abolished and that power be given to the President to amend the electoral law by decree. The necessary majority was not available to carry these proposals. Pilsudski and his supporters have also repeatedly insisted on the necessity for devising a new electoral system which will bring about the suppression of small groups and lead to the consolidation of parties into big blocs of the left, right, and centre.²

In spite of the criticism it has aroused it can scarcely be such a law before the elections. This decision was unpopular, since the present system pleases no one but the party managers.

¹ e. g. an article by Jules Chopin in *Gazette de Prague*, 10 December 1924. He attacks the existing electoral system as giving too much power to party managers and lowering the capacity of the Chamber. He makes the interesting suggestion that the party tie should be strengthened and not relaxed. The principle of the *mandat impératif* should be frankly admitted into the constitution. The electors should vote, not for a list of candidates, but for a party programme. The seats won by each party should then be assigned to individuals who must have attained a legally specified standard of capacity.

² It is probable that the electoral system will be considerably modified before the next elections.

expected that a system so recently and so enthusiastically adopted will be soon discarded; moreover, although its drawbacks are daily becoming more apparent, no other satisfactory method seems to present itself. The prejudice against the simple English system of single-member constituencies is still strong in countries where a large number of parties already exist, and the introduction of such a system would, at least at first, entail considerable injustice. Also it must be remembered that proportional representation is established not only by the electoral laws, it is provided for in the constitutions. The introduction of the majority system therefore would require a constitutional amendment, and the opposition at present is by no means sufficiently strong to make possible the formation of a majority large enough for this purpose.¹

It may be argued that the representation of definite material and professional interests is a natural development of modern democracy, which should be openly admitted and not artificially stifled by the introduction of an electoral system which presupposes that the country will be divided into two large parties. This attitude is perfectly tenable, but it is as well that the supporters of proportional representation should realize that the result of the system they advocate is the direct negation of the principles of formal democracy and of nineteenth-century Liberalism. A Parliament elected on this basis represents a number of isolated interests; it does not help to form 'the general will' of the nation. Moreover, if a new principle of election and representation is adopted, it is essential also to devise a new form of executive government, and not to rely upon one that has developed in close conjunction with a party system that has definitely been repudiated.

¹ See Appendix A.

PART IV

*CHECKS ON THE LEGISLATIVE POWER OF
PARLIAMENT*

CHAPTER VIII

REFERENDUM AND INITIATIVE

THE new constitutions have not been content with the mere statement of the fact of popular sovereignty, but have sought direct means of giving to the people the power of exercising their sovereign rights. 'We are convinced', said the reporter Berndt, when presenting to the Diet the project of the Prussian Constitution, 'that the sovereign people should not be separated from public affairs during the four years of the duration of the legislative period of the Diet. It should, on the contrary, be in a position during that period to take decisions itself on questions which present a particular importance, and if necessary to provoke the dissolution of the Diet.'¹ The leaders of democratic opinion on the Continent are in agreement with Rousseau when he says: 'The English people believe that it is free; it is grossly mistaken. It is free only whilst it elects members of Parliament; as soon as they are elected it is once more a slave, it is nothing.'²

The corruption of the American House of Representatives, the inefficiency of the French Chamber, the inability of the German Reichstag either to give real assistance to the Imperial Government or to make an effective stand for the

¹ Quoted in Aubrey, *La Constitution prussienne*, p. 75.

² *Du Contrat Social*, Livre III, chap. xv.

power of the people, had brought to many the firm conviction that elected representatives are as little to be trusted with the duties of legislation and government as is a hereditary monarchy or aristocracy. At the same time, the practice of direct legislation in Switzerland and America had given proof of the possibility of allowing the sovereign people direct and frequent use of its authority.

Distrust of a representative assembly, a Parliament of talkers and amateurs from whom the 'Fachman' and the official with knowledge and experience are excluded, has always been strong in Germany; and it is in that country and in those influenced by German thought that the widest use of the referendum and initiative has been made. Preuss referred to direct legislation as a necessary postulate of democracy; almost all political parties accepted it as a logical corollary to the theory of popular sovereignty. In Poland, Yugoslavia, and Czechoslovakia, on the contrary, where the influence of French constitutional thought is stronger, the referendum and initiative have been entirely, or almost entirely, dispensed with. So strong, however, was opinion in favour of the theory of direct legislation that the system was rejected in these countries, not so much because it was objected to in principle, but because it was considered unsuitable for a people not long used to the practice of self-government.¹

In Germany and the Baltic States, not the least of the arguments in its favour has been the supposed educative value of the frequent voting of the citizens on particular measures of national importance. It is considered an advantage that such measures can be brought before the people separately and judged on their own merits, and not included in a general election campaign, when opinion is swayed by

¹ e. g. see pp. 153-4.

agitation and party catchwords, and the citizen has to give his decision by one vote on many different subjects, each of vital importance to himself and to the State. Moreover, the experience of Switzerland has shown that the referendum often works in a conservative spirit against the introduction of innovations, and it is thought that in a democratic State reforms should not be introduced until the greater part of the nation has been converted to support them. In times of agitation and distrust the referendum may serve as a valuable means of bringing to light the opinion of the solid bulk of the nation, which is often obscured by the outcry of an extreme minority.¹ These arguments were successful in winning the support of all political parties in Germany, not excluding the bulk of the Nationalists' and People's Party, who, on the whole, supported the introduction of direct legislation into the constitution, especially in those cases in which the right of calling the referendum falls to the President.²

The arguments in favour of direct legislation are many and various. No less numerous are the ways in which the theory, when once accepted, can be applied in practice. In Switzerland and America, the simple method adopted is that according to which laws or changes in the constitution are either automatically submitted to the people for ratification, or are referred to them on the demand of a certain number of voters. The right of initiative, according to which a certain number of citizens can propose an entirely new law or amendment, is usually held to be a necessary complement of the referendum. Such a proposal must be considered by the legislative body, and if not accepted by them is referred to the people for final decision.

¹ Deputy Koch, 7 July 1919, Heilfron, pp. 3306-8.

² Deputy Dr. von Delbrück, 7 July 1919, Heilfron, p. 3315.

In the new constitutions the automatic referendum does not exist for ordinary laws, but in Estonia all constitutional changes,¹ and in Latvia those dealing with the most important clauses of the constitution,² must in all circumstances be referred to a popular vote. In Austria every general alteration of the constitution must be submitted to a vote of the people, a partial alteration only on the demand of one-third of the National Council.³

With regard to ordinary laws, the right to call a referendum in the new constitutions belongs not to a fraction of the people, but to some independent authority such as the President, or to a certain number of the Legislative Assembly. The popular initiative has, however, been adopted in Germany,⁴ Latvia,⁵ Estonia,⁶ and the German member States. A certain number of citizens can introduce an entirely new law or demand the abolition of an old one. The proposal of the people is handed to the legislative body in its finished form, and if rejected or amended by them, the issue is decided by a plebiscite. Although, therefore, the people on their own initiative cannot demand that a measure be referred to them before it is finally adopted, they can do so immediately after its promulgation. The right of initiative applies equally to constitutional as to other laws, but in most cases a constitutional change requires a larger majority. In Austria⁷ and in Lithuania⁸ a section of the people can initiate a law, which Parliament must consider. If such a law is amended or rejected no referendum takes place. The decision of Parliament in this case cannot be overridden.

The object of this form of direct legislation is to ensure that the legislative assembly be kept in harmony with the

¹ Arts. 88, 89.

² Art. 77.

³ Art. 44, 2.

⁴ Art. 73.

⁵ Art. 78.

⁶ Art. 31.

⁷ Art. 41, 2.

⁸ Art. 20.

wishes of the people, that it may truly reflect their desires and aspirations, may not pass any measure of which the bulk of the nation disapproves, or neglect to introduce innovations when the people are in favour of change.

In Estonia the principle has been carried to its extreme logical conclusion. If, when a plebiscite takes place, the decision of the people differs from that of the Legislative Assembly; if they refuse a measure that has been passed by the Seimas, or accept one that has been refused, an immediate dissolution takes place and new elections are held.¹

This Estonian system of automatic dissolution is unique; but in Prussia,² Bavaria,³ and most of the German States,⁴ the people have the right of recalling the representative body as a whole. The number of voters and the majority secured must, however, be larger than in the case of an ordinary referendum. In Prussia, for instance, a fifth of the voters can demand a dissolution of the Diet; a referendum then follows and the dissolution takes place if a majority of the qualified electors votes in its favour.

So far we have dealt only with the ordinary form of referendum and initiative already in force in Switzerland and in certain American States. The new constitutions have, however, shown considerable ingenuity in devising original methods of applying the principle of direct legislation.

In Germany,⁵ Estonia,⁶ and Latvia,⁷ a third of the Assembly may cause the postponement of a law for a period of two months; during this time the requisite number of citizens may demand a referendum. This right becomes nuga-

¹ Art. 32.

² Art. 6.

³ Art. 10.

⁴ Dr. Adelheit Menschell, 'Die Regierungsbildung im Deutschen Reich und seinen Ländern', *Archiv des öffentlichen Rechts*, Band 41, Heft 1, pp. 1-52.

⁵ Arts. 72, 73.

⁶ Art. 30.

⁷ Art. 72.

tory in Germany if both the Reichstag and Reichsrat declare the law to be urgent; in Latvia, if it has been originally declared urgent by a two-thirds majority, or if it is again passed by a three-quarters majority. In the Estonian Constitution, always the most democratic, there is no such limitation on this right of the minority to obstruct the passage of a law. The object of these provisions is to prevent the tyranny of the majority in Parliament. The minority, by rousing to activity its supporters in the country, can obtain the reconsideration by the nation as a whole of a measure accepted by the parliamentary majority. This power of the minority, however, is open to obvious abuse, and might lead to most unwelcome consequences. Its introduction into the constitution was in fact violently opposed by the parties of the right, especially in Germany.¹ It was pointed out that when a satisfactory compromise had been reached on a difficult issue between the Reichstag and the Reichsrat, the whole question might be opened again by the action of a factious minority in the Reichstag. In all these countries, and especially in Estonia, this right might also be used as a most effective weapon of obstruction on the part of the minority. It says much for the good sense of the people concerned that it has not been applied.

A much more practical means of checking the legislative absolutism of Parliament is that by which the President is allowed to call a referendum; since he, by virtue of his office, is expected to act impartially, and to use his right only when he considers that the wishes of the nation have been disregarded. In Latvia² the President, subject to the same restrictions as the minority of the Seimas, may postpone the

¹ Deputy Heinz, People's Party, Session 7 July 1919, Heilfron, pp. 3299-300.

² Art. 72.

promulgation of a law, and give the people the opportunity of demanding a referendum. In Germany¹ the President has the unrestricted right of holding back a law, and submitting it to a vote of the people. This provision was violently attacked by the extreme left as reactionary, and by others as a mere repetition of the President's right of dissolution. It was, however, considered wise to allow to this 'supreme guardian of the nation's rights' the power to demand a separate consideration by the people of measures of particular importance.

The Austrian Constitution² contains a somewhat curious provision, according to which 'every law passed by the National Council shall be submitted to a referendum . . . if the National Council so decides or if the majority of the Members of the National Council so requests.' The manner in which the referendum has been introduced into the Austrian Constitution, except in so far as constitutional changes are concerned, is singularly ineffective. A certain number of voters can initiate a law, but there is no provision that if the law is refused by the National Council a referendum shall be called. The only body which is competent to call a referendum on an ordinary non-constitutional law is the National Council itself, and this is the one body which can have no object in doing so, since it can pass laws on its own authority without referring them to the people and can even override the suspensive veto of the Federal Council.³

An interesting use of the referendum is provided for in Czechoslovakia.⁴ The Government can call a plebiscite if

¹ Art. 73.

² Art. 43.

³ N.B. This provision is not meant to protect the minority, since a majority decision is necessary to bring about such a referendum.

⁴ Art. 46.

one of its measures is refused by Parliament. This is the only form in which the principle of direct legislation is admitted in the Czechoslovak Constitution. Its object is to strengthen the position of the Government as against the Chamber. If the Government project were defeated in the referendum, the Cabinet presumably would resign; the object seems to be to enable the Government to pass a measure against the will of Parliament, without taking the extreme step of dissolving Parliament. So far the clause has remained a dead letter.¹

Perhaps the most practically useful application of the principle of direct legislation is that which recognizes the people as the ultimate deciding power when different branches of the legislature fail to agree. This was the only form in which the referendum was originally introduced into Preuss's first draft of the German Constitution. In Germany if the Reichstag and the Reichsrat disagree on a measure and cannot arrive at a compromise, the President may, at his discretion, either let the measure drop or call a referendum.² The position of the Reichstag as the more important body is secured by the provision that if a measure is passed by a two-thirds majority of that house, the President must either promulgate the law or pass it on to a referendum. The referendum is, of course, an obvious means of reaching a decision when the two houses of a legislature have arrived at a deadlock. It was suggested as a solution during the discussions of the Bryce Committee, but it had not hitherto been actually embodied in any constitution. The use of the referendum in this form has the advantage that only questions of real importance, or those which have aroused lively interest, are likely to be submitted to the people for decision.

¹ Franz Weger, 'Der Tchechoslowakische Staat', *Jahrbuch des öffentlichen Rechts*, 1922.

² Art. 74.

In Switzerland and America, and in most of the new constitutions which have made use of direct legislation, financial measures have been excluded altogether from the operation of the referendum. This has been done because it was thought that the people in considering a financial measure would vote according to their own pecuniary interests and would not judge the law on its own merits. It would always be easy to raise an agitation and bring about a popular vote against a budget introducing new or increased taxation. The Estonian Constitution¹ provides that laws relating to the declaration of war, the conclusion of peace, the declaration or withdrawal of a state of defence, and treaties with foreign States, as well as the budget, State loans, and laws connected with taxation, shall all be excluded from the operation of the referendum. The German Constitution has made an innovation in allowing to the President the sole power of instituting an appeal to the decision of the people on the budget and on laws dealing with taxation.²

Some of these constitutions, notably that of Estonia, contain no provision securing that a certain number of the electorate must take part if a referendum is to be valid. This has, however, been done in Germany: 'a resolution of the Reichstag shall not be annulled unless a majority of the qualified voters take part in the plebiscite.' If a constitutional amendment is submitted to a referendum, at least half the electorate must vote in its favour.³ In Lithuania a decision of the Seimas in regard to a constitutional change cannot be overthrown unless at least half the electorate take part in the vote.⁴

Not the least of the objections to the referendum and initiative as applied to the new constitutions is that they have done much to complicate the process of legislation. This is

¹ Art. 34.² Art. 73, par. 4.³ Art. 76.⁴ Art. 103, par. 2.

especially the case in Germany, where not only has a second chamber been set up, but also, owing to the anxiety of the democratic parties adequately to safeguard the rights of the people, the referendum has been introduced in various forms. Deputy Heinz, of the German People's Party, attacking the unnecessarily complicated system, said:

'The extension of the use of the referendum is the outcome of the idea underlying the whole scheme; of a tendency ever to distrust chosen authorities, and, as a result of this mistrust, to set up one authority above another, and by so doing to produce a state of continual unsettlement.'¹

The defence of the project by the liberal Koch is characteristic of the new democratic spirit:

'We know that the project is not simple, but we are of the opinion that at a time when there are obvious signs of the existence of a certain distrust of representative democracy, it is advisable to provide some outlet for this distrust; we are moreover of the opinion that in providing such an outlet, one has acted more wisely than if one had attempted to provide an organ of control in the form of a second chamber, be it called Upper House, Parliament of Industry, or any other name.'²

The new constitutions have not been sufficiently long in force to make it possible to tell whether the referendum will fulfil the expectations of its supporters. The best that can be said of it, so far, is that it does not seem to have done any particular harm.

In Germany, where the system is most complicated, and where it might be feared that its frequent use would lead to a complete stoppage of legislation, only one single referendum has been held.

In the spring of 1926 the Socialists and Communists, as a

¹ Session 7 July 1919, Heilfron, p. 3300.

² *Ibid.*, Heilfron, p. 3308.

protest against the extravagant claims of the princes, brought in a Bill, by means of popular initiative, for the total confiscation without compensation of the property of the former ruling houses. Such property was to be annexed by the States with the stipulation that it should be employed for the relief of the necessitous classes of the community. In the preliminary consultation the Bill received a sufficient number of signatures, and was laid before the Reichstag by the Government, who recommended its rejection as contrary to the elementary principles of justice. After defeat in the Reichstag the Bill was submitted to a referendum. This Bill was considered as an amendment to the constitution, and since such an amendment can be carried against the Reichstag only by a majority of the total electorate, the opponents of the Bill advised their supporters to abstain. In fact, less than 40 per cent. of the electorate took part, and the Bill had not the slightest chance of acceptance. Nevertheless the number of votes cast for the Socialists and Communists was considerable. The left wing of the Democrats and Centre must in some cases have voted against the instructions of the party leaders. It does not follow that many of the moderate Socialists were not themselves opposed to this wholesale confiscation. The history of the Bill shows how strongly a minority may be tempted by the referendum system to gamble on a popular cry. It is probable that if the Government had been able at an early stage to obtain a majority in favour of a satisfactory compromise Bill the referendum would never have taken place.¹

¹ The Government did in fact prepare such a Bill. The legal advisers, however, declared it to be a constitutional amendment, and owing to the obstinacy of the Nationalists and Socialists the necessary two-thirds majority was not available.

In spite of pressure brought to bear on him from the parties of the right, President Hindenburg made no attempt to prevent the referendum or declare it unconstitutional. He did, however, make a statement strongly condemning the principles of the Bill, and pointing out the danger of future referendums of a similar kind attacking other forms of private property.

At this time it did, indeed, seem probable that the Government might be faced with a veritable plague of plebiscites. The effects of the currency settlement weighed heavily on the victims of inflation. According to the valorization law the rate paid varies from 1 per cent. to 5 per cent., except on mortgages, which in exceptional circumstances can be valorized at a maximum of 25 per cent. An organization of holders of depreciated paper proposed the initiation of a Referendum Bill authorizing valorization, according to one proposal at 50 per cent., according to another at 100 per cent. of gold mark value. The Minister of Economic Affairs pointed out that if any such proposal were carried the country would be faced with a fresh economic crisis. The Government forbade the referendum as contrary to the clause of the constitution according to which financial measures can be submitted to a referendum only on the initiative of the President. In order to settle the question beyond doubt they introduced a Bill declaring that any referendum dealing with the consequences of inflation would come under this clause. The lack of a special judicial body with power to interpret the constitution is continually making itself felt.

In Latvia and Estonia, there has been no referendum resulting from the exercise by the President or the requisite minority of the Seimas of their right to delay a law. In these countries, however, the people have made considerable use of their right of initiative, and frequent popular votes have

taken place, especially in the years immediately following the adoption of the constitutions.

In Estonia, for instance, during the first Parliament in 1922, the requisite number of citizens demanded that the existing laws regarding religious education should be changed and that the State should bear the expense of religious instruction. The law was rejected by the Seimas and a plebiscite was held. The majority of those voting were in favour of the law in question, and as a result the Parliament came to an end and new elections were immediately held. The frequent use of the referendum in Estonia might lead to most unwelcome consequences. As there is no provision in the constitution that a majority of the voters need take part in a plebiscite, a small minority of the nation may, in fact, obtain the dissolution of the Seimas. If only a comparatively small number of citizens take part in a plebiscite held on a law in which the bulk of the nation is not interested, and a small majority is obtained which reverses the decision of the Seimas, it is absurd to conclude from this that the nation has changed in opinion or shown distrust in its chosen representatives.

It may of course happen that the Assembly loses the support of the people before the conclusion of its term of office. It would seem wiser to guard against this contingency by enabling the people to make a direct demand for dissolution as in the German member States. The Estonian system of automatic dissolution may be theoretically sound; in practice it leads to a confusion of issues. A chance vote against a particular measure may lead to the dissolution of an Assembly in which the people as a whole have confidence; on the other hand, if the Assembly has really lost the support of the nation, the people will take the opportunity of voting against the

Assembly whatever their real opinion about the particular measure before them. Every plebiscite will take the form of a vote of confidence in the Government; the referendum loses all value as a means of discovering the unbiased opinion of the people on a particular question.

The experience of Switzerland and America,¹ and of the countries which have adopted the referendum since the war, has shown that the people as a whole are not sufficiently interested in public affairs to vote in large numbers on particular measures. Even when questions of real importance are submitted to them the vote is usually much smaller than in a parliamentary election; in ordinary cases, the majority of the citizens do not take part. In Latvia, for instance, a considerable number of plebiscites has been held; on no single occasion have as many as half the qualified voters taken part. On one occasion, the Government, needing the support of the Roman Catholics, passed a law restoring to them a church that had been handed over to the Protestants. The Protestants organized a popular initiative, and a plebiscite was held;² but although the question had aroused considerable feeling, only a small percentage of the people took part in the vote. The President of the Republic decided to ignore the decision of the plebiscite; he argued that on the same principle a referendum, in which forty-nine citizens voted for a measure and fifty against, might be taken to express the opinion of the nation and overrule the decision of the Seimas. Although the constitution does not state that a majority of the voters need take part when an ordinary law is proposed by popular initiative,³ he established the precedent that the

¹ Lowell, *Public Opinion and Popular Government*.

² Max M. Laserson, 'Das Verfassungsrecht Lettlands', *Jahrbuch des öffentlichen Rechts*, Band XII, 1923-4, p. 261.

³ Art. 78.

decision of a plebiscite will in all cases be ignored unless at least half the enfranchised citizens have voted. In Germany a similar contingency has wisely been guarded against.

These considerations lead to the conclusion that it would have been wiser to put more confidence in the chosen representatives of the nation. Because the people are sovereign, it does not follow that they should not entrust an elected Assembly with the duties of legislation and government, especially since the new constitutions have employed every possible means to make that Assembly reflect as accurately as possible the opinion of the nation as a whole. Experience, moreover, has shown that the people are either incapable or unwilling continually to take an active part in the work of legislation and to give their decision on particular questions. The supporters of direct legislation would answer, of course, that the fault lies not with the system but with the people, who must be educated to take a real interest in public affairs and acquire sufficient knowledge to make reasoned decisions on all questions of national importance.

‘A people is not free unless it consists only of masters.’

In countries where Parliament does not inspire real confidence, and where the condition of parties is such that large issues are likely to be obscured by the strife of political factions, it may be an advantage that the people should have the power occasionally to express a definite opinion on certain big issues. The value of the referendum depends upon the extent to which it is possible to induce the people to consider such issues on their own merits and not from the party point of view. In practice this end has not yet been achieved. The popular votes in the Baltic States have usually been on small, comparatively unimportant questions. The single use of the referendum in Germany was by no means creditable

to its initiators. It is significant that really big national issues, such as the acceptance of the Dawes Report or the entrance of Germany into the League of Nations, were considered too critical and *too important* to be submitted to the people, and the people showed sufficient discernment and sufficient confidence in their leaders not to interfere. There seems little reason to hope that if more frequent use were made of the referendum the vote would follow anything but strictly party lines.

There can be no doubt that the multiplication of the methods by which a referendum can be brought about leads to quite useless complication. The continual reference to the people of the details of legislation is to be avoided rather than encouraged. The work of legislation in a modern State is no simple matter. We find, on the one hand, the complaint that this work of real technical difficulty is entrusted to a Parliament of amateurs; and on the other hand, an attempt to transfer it to the whole people, who must in the nature of things have even less knowledge than the chosen member of Parliament, who is expected to give his time and energy almost entirely to public affairs. It is scarcely to be hoped that the people as a whole will ever acquire sufficient knowledge and interest to make profitable a continual reference to them of difficult questions of legislation. Such a reference is, after all, only a transference of responsibility, and unwillingness to undertake responsibility is one of the surest signs of failure on the part of any form of Government. Moreover, the people have shown themselves by no means anxious to bear the burden. Hegel's maxim still remains true: 'The people is that part of the State that does not know what it wants.'

CHAPTER IX

SECOND CHAMBERS.

DURING the nineteenth century, distrust of a single legislative assembly originated rather in conservative than in democratic sentiment. It was feared, not that the Assembly would fail to express the progressive aspirations of the people, but that, easily swayed by oratory and by the impulse of the moment, it might pass ill-considered measures, or introduce far-reaching changes with the sanction of chance majorities. The fact that Governments in France are so often overthrown by chance votes on comparatively unimportant questions might indeed be used as an argument to show that there is some real danger of irresponsible action in those spheres in which a single chamber has sole authority. For these reasons the bicameral system was almost universally adopted. It was felt that a second consideration by a more stable, more conservative body, was necessary before any measure should become law. It was also hoped that room would be found in the second chamber for the special representation of intellect, character, political knowledge and experience. The authority lost by less direct contact with a sovereign people would be counterbalanced by the respect naturally engendered by this aristocracy of wisdom and virtue.

Although the theory was almost universally accepted, its application was by no means easy. It is to a large extent the criticism aroused by such bodies as the French Senate, and the seeming impossibility of devising a satisfactory means of reforming the English House of Lords, that has led to the

growing distrust of second chambers apparent in the new constitutions.

The second chambers of modern democracy have indeed something artificial in their composition. Representation according to estates, the special influence given to a hereditary aristocracy, in which we find the historical origin of the two-chamber system, is obviously incompatible with modern democratic theory. The twentieth century has seen the abolition or complete transformation of two of the last remaining hereditary chambers, the Prussian Herrenhaus and the Hungarian House of Magnates. The House of Lords itself has lost almost all its former powers, and depends for continued usefulness upon the possibility of drastic reform. In Poland and Czechoslovakia, in spite of the existence of an old and distinguished aristocracy, it was never even suggested that this aristocracy should be given special representation in the constitution. Since they were determined to keep the form of the two-chamber system, whilst at the same time entirely discarding the principle to which it owed its origin, the framers of modern democratic constitutions, both in the nineteenth and twentieth centuries, were compelled to devise some other method of composing the upper house. Their attempts have not met with any remarkable success, for except where a federal form of government, or the existence of strong provincial feeling, made it necessary to give special representation to particular local interests, as in America, Switzerland, and the new constitutions of Germany, Austria, and Prussia, these second chambers, owing to the artificial nature of their composition, carry little weight with any section of the people.

Some of the new constitutions, Yugoslavia, Estonia, Latvia, Lithuania, and Finland, have dispensed altogether with a second chamber. The Baltic States are the most democratic

of the new constitutions and incline towards a system of direct legislation in which a second chamber is obviously superfluous. In Serbia the Radicals had always been opposed to an upper house. Such a body had been included in the constitution of 1901,¹ but had caused a split in that party. The sinister influence exercised by the King through this body created such a prejudice against the bicameral system that a single chamber was adopted with little opposition in the Serbian Constitution of 1904 and in the Yugoslav Constitution of 1920.²

The new constitution of Yugoslavia has sought a safeguard against hasty legislation in the provision that every law, before being finally adopted, must be submitted to two votes in the same session.³ No interval of time, however, was fixed between the two votes, and the clause has in fact been evaded by the rules of procedure which provide, except in the case of urgency, for three readings of the same Bill, but not for two separate votes on the completed measure.⁴

In Finland the rules of procedure provide that, at the third reading, the consideration of a project of law can at the request of a single member be postponed until the next sitting. At the next sitting, if one-third of the members so demand, the decision can be postponed until after the next elections. The new Rikstag must deal with the measure afresh in the form in which it was passed at the second reading. This rule does not apply to Government projects which are introduced during an extraordinary session of the Rikstag.

¹ Peritch, 'Étude sur la nouvelle constitution du Royaume de Serbie', *Bulletin de la Société de Législation comparée*, 1902-1903, pp. 334-5.

² Nikodje Yovanovitch, *Étude sur la Constitution du Royaume des Serbes, Croates et Slovènes*, pp. 104-5.

³ Art. 86.

⁴ Yovanovitch, *op. cit.*, pp. 145-8.

The object is to prevent the passage of a law by a chance vote, and also, unless an overwhelming majority is available, to provide for the possibility of a fresh appeal to the people before a proposal becomes law. It may be argued that too much power has been given to the minority, and that they may cause the postponement of a decision simply as a means of obstruction and not because there is any real reason to believe that new elections would bring a change in the opinion of the house. In fact this has not happened. The minority have used their power only with good reason. Obstruction on the part of the parliamentary minority is one of the few evils from which the new constitutions have not suffered.¹

Even where a second chamber was introduced, notably in Poland and in Czechoslovakia, a very strong opposition was able so far to modify the original scheme that the composition of the assemblies became almost as democratic as that of the lower house, and their functions so small that it is doubtful whether they will be in a position to play any useful part in the government.

In Poland² the original plan of the Paderewski Government was to provide, not a second chamber, but a 'Garde des Droits',³ which should have the right to examine all the laws passed by the Diet. In case of non-agreement between the two bodies, the President was to have the right of decision. This 'Garde des Droits' was to consist of members chosen by various authorities; thirty were to be elected by proportional representation by the Diet from within or without its own

¹ Out of 113 Bills presented in 1924, 22 were postponed till the next session and five until after the next elections.

² Blociszewski, 'La constitution polonaise du 17 mars 1921', *Revue des Sciences Politiques*, vol. xiv, pp. 32 seq. (January-March 1922).

³ Potulichi, *op. cit.*, p. 35-6.

members; thirty were to be chosen by the President 'from among those who had deserved well of their country'; a certain number, chosen from the various universities, were to be representatives of higher education. The final project of the constitutional committee provided for a Senate, of which seventy members were to be elected by the Diet according to proportional representation from outside its members; a certain number of members were to be representatives of local autonomous bodies, two from each province and two from each town; the remaining members were to consist of five representatives of the Catholic Episcopacy, and three of other religious bodies, and of representatives of higher education, scientific institutions, and of the Supreme Economic Council. The Senate was to have the right of veto, but their veto could be overridden by a three-fifths majority of the Diet. The influence of the Bryce Report can be traced in the suggested composition of this somewhat heterogeneous body, raised, it may be supposed, by means of indirect election above the sordid ties of political party, representing the conflicting interests of various Churches and local bodies, and at the same time elevated by the virtue of retired soldiers and politicians and by the intellect of school and university. The scheme **was**, however, so violently attacked in the Assembly by the parties of the left, who were altogether opposed to the bicameral system, that it was modified almost beyond recognition. So strong was the feeling on this question that the work of the Constituent Assembly was for some time entirely held up by the obstruction of the Socialists and Workers' parties, who demanded that a new Assembly should be elected to consider the articles in regard to the Senate, or that a referendum should be called to decide whether or not there should be a second

chamber.¹ Eventually the committee altered the project to its present form,² in which it was passed by a small majority.

The Senate is elected for the same term of years as the Diet, and on the basis of direct suffrage. As the number of senators is only a hundred and eleven, a quarter of the number of deputies, the constituencies are larger than those which elect the Diet. Except in the case of colonists, workmen, and officials, whose conditions of labour may have made a change of residence essential, a year's residence in the district is necessary. An attempt has been made to preserve a conservative atmosphere by raising the age for electors to thirty, and for senators to forty. The majority of the Diet necessary to overrule a decision of the Senate was reduced from three-fifths to eleven-twentieths. The one really important function remaining to the Senate, according to the constitution of 1922, was that of giving its consent to a dissolution proposed by the President.³ This provision was a direct imitation of the French Constitution. Its unsatisfactory effect on the development of parliamentary government soon became apparent. According to the recent constitutional amendment, the right of the President to dissolve is no longer dependent on the consent of the Senate.

On the whole the final decision in regard to the Senate was the result of a compromise in which the more moderate opinion of the centre parties triumphed over the extremes of the right and left. This moderate point of view was well expressed by a member of the Club du Travail Constitutionnel: 'No elected Assembly will ever really represent the wishes of the nation; it is therefore wise to control the Diet by a second chamber. The Senate must also derive from the popular will. Such a body is all the more necessary in Poland,

¹ Potulichi, *op. cit.*, pp. 12 and 35 (notes).

² Arts. 35, 36.

³ Art. 26.

since the referendum cannot usefully be employed amongst a people who have had no long education in democracy.¹

In Czechoslovakia the legislative powers of the Senate are rather greater, but its composition is equally democratic. The original Government project² had provided for a successive change of members, half to resign every four years, and had insisted upon an age qualification of thirty years for voters. The opposition of the Social Democrats, however, caused a modification of the scheme: the Senate is elected by direct suffrage for a term of eight years; electors must be at least twenty-six years of age, and senators forty-five.³ The Czechoslovakian Senate, unlike that of Poland, has equal legislative initiative with the lower house. The Senate, however, must act on a Bill proposed by the Diet within six weeks; where the budget is concerned, within four. The Diet, on the other hand, need give no decision on a project of the Senate until three months after its presentation.⁴ A Bill passed by the Senate and rejected by the Diet cannot become law, but a Bill of the Diet, if refused by the Senate, becomes law on being again passed by the Diet; if originally refused by a majority of two-thirds, a majority of three-fifths is necessary to override the decision of the upper house.⁵ Under ordinary circumstances the veto of the Senate is only suspensive, but an absolute veto can be put by a large majority of the Senate on Bills passed by a bare majority of the Diet. A constitutional change is valid only with the assent of a three-fifths majority of all the members of each chamber.⁶

¹ Potulichchi, *op. cit.*, p. 10 (notes).

² Dr. Vladimir Dedech, *Journal of Comparative Legislation and International Law*, third series, vol. iii.

³ Section II, Arts. 13, 14, 15, 16.

⁵ Section II, Art. 44.

⁴ Section II, Arts. 41, 43.

⁶ Section II, Arts. 33, 42.

In Germany the existence of a federal form of government gave to the Reichsrat, as to the former Bundesrat, its special *raison d'être*. The growth of the unitary principle at the expense of the rights of the separate States meant a very considerable increase in the powers of the Reichstag as against the other house. It was, however, considered that some special representation must be given to the separate interests of the States. These are, therefore, represented in the Reichsrat by members or delegates of their Cabinets. Every State has at least one vote, and a further one for every million inhabitants, as well as one for any fraction left over equal to the number of inhabitants of the smallest State. No one State, nevertheless, may have more than two-thirds of all the votes—a stipulation obviously directed against the hegemony of Prussia, as is also that which provides that one-half of the Prussian representatives be appointed, not by the Prussian Government, but by the local representative authorities.¹

The States may send as many representatives as they have votes, but in committee no State may have more than one vote.² Preuss's original plan had proposed a Staatenhaus, the members of which were to be chosen according to proportional representation by the Assemblies in the various States. It was, however, considered that such an assembly would merely reflect the strength of political parties already amply represented in the Reichstag, and would not have obviated the necessity of summoning a separate council of the representatives of the Governments of the States. The framers of the constitution definitely stated that they considered legislative authority to rest with the Reichstag, and ultimately with the people. The Reichsrat was to reflect the opinion and represent the interests of the separate States;

¹ Section IV, Arts. 61, 63.

² Section IV, Art. 62.

they had no intention of dividing the legislative power equally between the two chambers.¹ Nevertheless, the legislative functions of the Reichsrat are by no means negligible. Both houses have equally the right of initiative. The Government must seek advice from the Reichsrat before presenting its measures to the Reichstag, and the Reichsrat introduces its proposals to the Reichstag through the medium of the Government; but if the Reichsrat and the Government do not agree, neither can block the way for the other to the Reichstag; the measure is then presented together with a statement that the Reichsrat and Government have failed to agree.² If either house refuses a measure proposed by the other, and no compromise can be arrived at, the decision rests with the President, and through him ultimately with the people. The President must either allow such a Bill to lapse, or he may refer it to referendum. If it has been passed by two-thirds of the Reichstag, he must either promulgate the law or pass it on to a referendum; it cannot simply be allowed to lapse.³ A constitutional change requires a two-thirds majority in either chamber, but the people in the referendum can override the decision of the Reichsrat by a simple majority, provided half the electors take part, and a decision of the Reichstag only if half the electors vote against the Reichstag.⁴

The new constitutions have shown a singular lack of originality in dealing with the question of the upper house. This is largely due to the pressure of democratic opinion, which made it inevitable, for instance, in Poland and Czechoslovakia, that

¹ In spite of the considerable limitations to the legislative power of the Reichstag the constitution states that 'National laws shall be enacted by the Reichstag', Art. 68.

² Art. 69.

³ Art. 74.

⁴ Art. 76.

the form of election for the Senate should eventually closely resemble that for the Diet. It cannot be hoped that a body which is almost a duplicate of the lower chamber will play any important part in, or make any useful contribution to, the political life of the country. These assemblies will not even have the advantage of cutting across parties and bringing unbiased judgement to bear upon the resolutions of the other house. It cannot be hoped that a higher age qualification alone will give much added weight to their counsels. In Poland the elections for the Senate take place at the same time and for the same period as those for the Diet.¹ If the Diet should be dissolved during the legislative period the Senate is also automatically dissolved.² There is, therefore, considering the similarity of the electorate, no real possibility of difference of opinion between the two bodies. The elections for the Senate, in fact, do not arouse any real interest, since it is taken for granted that a Government having a majority in the Diet will also have the support of the Senate.

In Czechoslovakia, since the elections take place at different times and for different periods,³ it is possible that the parties commanding a majority in the Diet may be in a minority in the Senate. This does not, however, give anything but a precarious guarantee against abuse of power by the majority in the Diet. An analysis of the returns after the first elections in April 1920 shows that the comparative strength of parties in the two chambers is almost identical; in no case do they vary by more than five per cent.⁴

The same criticism has been brought against the German

¹ Art. 36, par. 2.

² Art. 26.

³ Arts. 11, 16.

⁴ See figures quoted in Édouard Jolly, *Le Pouvoir législatif dans la République Tchécoslovaque*, p. 31.

Reichsrat, especially by the Conservative parties.¹ Except where the interests of the separate States are concerned, it is not likely that the Reichsrat will act in its true capacity of an upper chamber as a counterpoise to the lower house. The officials sent as delegates by the State Governments have no independent voice or opinion. All delegates from one State vote together. They therefore merely represent the majority party or coalition in the State Parliaments. These are chosen on the same suffrage as the Reichstag, and—except in the rather unlikely circumstance that the majority of the State Diets were elected at different times to the Reichstag and that a change of opinion had in the meantime taken place—the Reichsrat, as the Staatenhaus would have been, becomes a mere mirror of the Reichstag. It fails to represent the more considered opinion of the nation, and is not a true counterpoise to party absolutism.

The difficulty of devising a satisfactory means of composition being so great, and apparently so insurmountable, we are left to consider whether it would not have been wiser to dispense with the upper house altogether. There is indeed considerable reason to suppose that the danger of that kind of hasty legislation which a second chamber is intended to prevent is not sufficiently urgent to warrant the establishment of this separate organ of the constitution. In most of these States an elected President is entrusted with a suspensive veto. This veto, exercised at the discretion of the Government, would make it possible to demand a second consideration of any Bill or amendment hastily passed. As Mr. Morgan has shown, wherever the parliamentary system

¹ e.g. Deputy Dr. von Delbrück, Session 28 Feb. 1919, Heilfron, p. 958. Also Freiherr von Freytag-Loringhoven, *Die Weimarer Verfassung in Lebre und Wirklichkeit*.

exists, a strong Government having command of a majority in the chamber, and with the experience and knowledge of the Government departments at its command, is the best guarantee against ignorant or ill-considered legislation. In England the Government is considered responsible not only for its own Bills, but for any Act which it allows Parliament to pass, and 'A Government Bill is the product of many trained minds; the parliamentary draughtsman sees that it is dovetailed into the body of existing statute law; the Treasury are called in to consider what charges upon the national revenue it may involve; the departments are consulted to advise what administrative duties it may throw upon them.'¹ Control of legislation by the Government on the Continent is not as perfect as in England, but the use of the Presidential veto might do much to remedy this defect.

We have spoken of the poverty of invention of the new constitutions in dealing with the problem of an upper house. Nevertheless, although they were not accepted, suggestions were made to introduce an entirely new kind of second chamber, elected on the principle of functional representation, to which we have already referred. The idea originated in Germany and was put forward in rather different forms by the two extremes of the left and the right.

The Conservatives thought that in the upper house the old organization of electors according to estates should be replaced by a new system of election by profession. They insisted that the intellectual and industrial occupations should be given equal representation.² The electors should not be

¹ J. H. Morgan, *The Place of a Second Chamber in the Constitution*, pp. 9-10.

² The German Nationalists are by no means opposed to a professional chamber, but they see ruin in the motto of the Industrialists, 'Die Wirtschaft ist das Schicksal' (Freytag-Loringhoven, *op. cit.*).

artificially isolated, as in accordance with the democratic principle, only to be reunited again by the ties of political party, but should be organized naturally, in accordance with their interests and professions. An upper house, elected in this way, would be more than a mere check upon the lower chamber; it would be able to play a really valuable and creative part in the work of legislation, and would supply the element of specialized knowledge and experience, so important to the efficient working of Government, and yet so singularly lacking in an assembly chosen on the basis of political parties. Delbrück suggested that some of the members of the Reichsrat should be chosen by the industrial organizations—by the *Arbeitsgemeinschaften*. ‘This first chamber would then consist, half of representatives of the member States, and half of representatives of the *Berufsstände*.’ The industrial element, always in favour of unity, would counteract the particularist tendencies in the Reichsrat. New ideas and knowledge would be introduced.¹

From the Majority Socialists came the suggestion that the second chamber should be organized entirely on a professional basis. The most difficult problems of modern life are economic; the most important function of a modern Government is to organize the economic life of the nation. For this work, the political Parliament chosen by universal suffrage is altogether inadequate. An economic second chamber should, therefore, be established to deal specially with these questions. It should be composed of delegates from the councils of production, into which the various industries should be organized. It should have the right of initiative and of the first consideration of all economic measures, and the right of veto on all laws passed by the political assembly,

¹ Session 28 Feb. 1919, Heilfron, p. 958.

unless they were voted for three years in succession in the same terms. In case of disagreement either chamber should have the right to call a referendum. The councils of production in the various industries, and hence the economic chamber itself, would be organized on the parity principle, owners and men being equally represented. The suggestion of the Socialists was of course more far-reaching than that of the Conservatives. They hoped that all political power would eventually fall to the economic chamber; the voice of the people expressed through the referendum would show that they considered themselves more adequately represented in this professional chamber than in that elected by the political parties.¹

Both suggestions were attacked as undemocratic by the parties of the centre.² It is interesting to notice that one of their chief arguments against the Socialists was that the parity principle was essentially undemocratic. The employers would be given great advantage over the employees. A small number of employers would return as many members as a large number of employees. Both the Socialist suggestion that special representation should be given to producers, and the proposal of the conservatives that the industrial and intellectual occupations should be given equal representation in spite of their numerical differences, were contrary to the fundamental principle that every individual is a separate unit, isolated from every other unit and joined only by the common association of the State—that every citizen possesses a vote equal in weight with that of every other citizen. To this it was answered that real democracy must take into account not only the question of numbers, but the special rôle which

¹ For the plan of the Majority Socialists, drawn up by Cohen, Kaliski, and Buchel, see Tartarin-Tarnheyden, *op. cit.*, pp. 152-4.

² Brunet, *op. cit.*, pp. 36-91.

certain elements play in the life of the nation. According to the Conservatives, the industrial, professional, and intellectual occupations are equally important to the life of the nation; therefore they should be given equal representation in a chamber chosen on a vocational basis. According to the Socialists, the producers are the most important members of the State; upon them the life of the nation depends. A special 'Council of Production' should therefore be established.

These ideas were not without influence in other countries. In Latvia¹ the Germans, under the leadership of Dr. Schiemann, suggested in the Constitutional Committee that a second chamber should be organized for the representation of group interests. In Yugoslavia² the Clerical Party, opposing the unicameral system, suggested that a professional second chamber should be established. This assembly should consist of two hundred members—a hundred to be elected by universal suffrage according to professions, a hundred to be delegates of the professional assemblies of the country, to be elected at the same time. The two chambers would be equal in powers, but different in functions. A distinction would be drawn between questions of a political nature and those dealing with social or economic matters. In accordance with this distinction, they would be referred either to the political assembly or to the economic chamber. A measure accepted by one house would be passed on to the other for modification or approval; in case an agreement could not be reached, the final decision should be taken in a joint session. Certain matters, such as the declaration of war, conclusion of peace, treaties of commerce, the budget, questions relating to the throne, and revision of the constitution, would be in the competence of both houses and would be dealt with in

¹ Max Laserson, *op. cit.*, p. 259.

² Yovanovitch, *op. cit.*, pp. 105-6.

a joint session. It was not stated how the dividing line should be drawn between political, social, and economic measures, and with whom, in cases of dispute, the ultimate decision in regard to questions of competence should rest. Neither was any suggestion made as to how exactly the professional chamber should be chosen, or whether a distinction should be drawn between employers and employees.

The idea of a professional chamber was refused by the Constitutional Committee, which, when deciding in favour of the unicameral system, made the truly democratic declaration that 'the Skupstina is the representative of the whole people, and every member of the Skupstina represents every class and every profession.'¹

In Poland the Socialists suggested that, instead of the Senate, a chamber of labour should be established to 'represent and protect the interests of all labouring citizens of the Republic'. This assembly was to be equal in numbers to the Diet; it was to be elected for three years by councils of delegates of town and country workers, by professional associations, and by associations of intellectual workers who 'hire their labour either to a capitalist or to the State'. In regard to all measures affecting the social conditions of the working classes, and all measures dealing with the relations of capital and labour, the chamber of labour should have the right of first consideration, of veto and of initiative. In case the political chamber should pass or refuse a measure against the wish of the chamber of labour, this body should have the right, on the decision of a two-thirds majority, of referring the matter for final decision to a vote of the people.² It should be noticed that this body, being narrower in its composition than

¹ Ivan Zolger, 'Die Verfassung Jugoslawiens', *Jahrbuch des öffentlichen Rechts*, 1922.

² Potulichi, *op. cit.*, pp. 52-4, notes.

that suggested in Germany and in Yugoslavia, would also be more limited in its functions. It would deal exclusively with the conditions of the working population and not with the general economic policy of the State.

All these suggestions were rejected, as a result of the preponderance of the Democratic parties in the Constituent Assemblies. Any attempt to differentiate between the functions of the two chambers or to take from the lower house the ultimate power of decision would lead to serious difficulties. There can, however, be no doubt that if second chambers in the future are to have any vitality or to play any valuable part in the work of legislation they must be chosen by some entirely new means of election, by some method similar to that suggested by the supporters of functional representation.¹ If the upper house is to be a mere duplication of the lower it is better to dispense with the institution altogether. Particular interests exist in every State; it is both safer and more profitable that they should be given constitutional means of expression. Wherever the Cabinet system has been introduced and the Cabinet is dependent only on the lower chamber, it is inevitable that the upper house will lose influence and take a second place.² Such an upper house, in conjunction with the

¹ In Poland the parties of the left, at the time of the recent constitutional amendment, suggested that the Senate should be abolished, as it is useless and expensive, and that its place should be taken by an assembly representing the Trade Unions and other professional associations.

² It is significant that the two most successful second chambers of modern democracy are to be found in countries where the parliamentary system has not been introduced—in America and in Switzerland. The American Senate carries more weight than the House of Representatives and attracts the best political talent of the nation. This is the case not only because the Senate represents State interests and is a comparatively small and therefore efficient body, but because it enjoys the added advantage that

parliamentary system, can justify its existence, not as an organ of control, but only as a body specially fitted to improve the legislation of the lower house, and to prepare measures which, although important in themselves, a modern Parliament is compelled, through lack of time, to postpone indefinitely, or to pass without due consideration of detail. For the aristocracy of birth, chosen according to the system of hereditary estates, there might be substituted in the upper house an aristocracy of specialized knowledge and intelligence; to set up a body differing from the lower house only in the advanced age of its members, and to deprive it of all-important powers of legislation, is to establish an institution only that it may decay in insignificance.

such limited executive functions as are entrusted to Congress belong exclusively to the Senate. In Switzerland the functions of the two chambers are identical. The executive is responsible to neither, but such limited control as exists is equally divided and gives equal power to both chambers. It happens that in both cases the constitution is federal, and that the second chamber was originally established with the intention of giving representation to particular State interests; this has obscured the fact that the absence of a parliamentary ministry responsible to the lower chamber is the chief cause that has prevented the preponderance of that body. The German Constitution is also federal. The interests of the States are represented in the Reichsrat. Nevertheless the Reichsrat is a much less important body than the American Senate or Swiss Ständerat. This is due to the fact that parliamentary government has been introduced; the Cabinet is responsible to the Reichstag, and political power and interest is therefore concentrated in that body. The same principle applies to non-federal States. The development of Cabinet government in England has been accompanied by a steady loss of power on the part of the House of Lords. In France the Senate is comparatively strong; this is possible only because the Cabinet is remarkably weak. The Government does not lead or control the chamber, and some revising authority is therefore useful.

CHAPTER X

THE LEGISLATIVE FUNCTIONS OF THE PRESIDENT

THE modern exponents of the principle of democracy, distrustful of their own representatives, have tended to give control to a single individual, an elected President, rather than to a second chamber. It might have been expected that in those countries where a comparatively strong second chamber was established, the power of the President would be correspondingly smaller than in those that had adopted a unicameral system. This is, in fact, the case only to a very limited extent. In Poland, where the upper house can exercise a certain control over legislation, the President, according to the constitution of 1921, was reduced to the position of a mere figure-head. In Germany, however, the tendency to set up one authority against another was so strong that the existence of a restraining body in the form of the Reichsrat did not prevent wide powers being given to the President; the same desire to introduce an elaborate system of checks and balances, due largely to American influence, is apparent in the Czechoslovak Constitution.

In Yugoslavia legislative power is, according to the constitution, divided between the King and the National Assembly.¹ The King theoretically has the power of absolute veto.² It is likely that this absolute veto vested in the hereditary monarch will, as in England, become a dead letter.

¹ Art. 46.

² Ivan Zolger, 'Die Verfassung Jugoslaviens', *Jahrbuch des öffentlichen Rechts*, 1922.

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This was, in fact, the case under the former Serbian Constitution. Experience seems to show that under a democratic constitution it is possible to give to an elected President, who derives his authority from the people and can be removed by them, more real political power than to an hereditary ruler. Moreover, a suspensive veto, which depends upon the ratification of the people or is intended only to bring about the reconsideration of a measure, is really a more effective weapon than an absolute veto, which implies an independent source of authority in the State head. Such a veto can be exercised only in exceptional circumstances; if it falls into disuse, any attempt to revive it would lead to a constitutional crisis.

In Poland the President has no veto, and according to the original constitution he had no right of initiative. The extension of the legislative functions of the President was one of the main points of Pilsudski's scheme of constitutional revision. The presidential veto has not yet been introduced, but by the constitutional amendment of August 1926 the President has been given the right of legislation by decree within certain definite limits.¹ During the period when the Chamber is not in session, the President may issue decrees having the force of law. These decrees must be countersigned by the President of the Council and by all the ministers, and they must be laid before the Sjem for ratification within fourteen days after the beginning of the next session. Certain subjects, the electoral law, the amendment of the constitution, the declaration of war and conclusion of peace, the strength of the army, the budget, State debts, and commercial treaties, are definitely excluded from the legislative

¹ Constitutional amendment, 2 August 1926, Art. 5, which is an addition to Art. 44 of the Constitution of 17 March 1921.

competence of the President. The amendment also provides that the legislative powers of the President may be further increased by an ordinary law, which must definitely state the nature of the subjects on which he may legislate and the time for which the power is conferred. Such a law cannot give the President the right to alter the constitution. Simultaneously with the adoption of the constitutional amendment a law of this kind was actually passed giving to the President the right of legislating by decree on social and economic questions and on the reform of the civil and criminal codes. All subjects normally excluded from the legislative functions of the President were also expressly excluded in the Act by which these special powers were conferred.¹

The modern distrust of representative assemblies could be fully justified by the example of the Polish Sjem. Owing to the disintegration of parties and the bitterness of party feeling, the deputies have spent most of their time in mutual recriminations, in the overthrow of ministries, and in the prolonged negotiations preceding the formation of new coalitions. Very little time has been found for the important work of legislative reform. On the rare occasions on which useful Bills have been prepared, they have often been rejected, not on their own merits, but as the result of factious opposition. At the time of the *coup d'état*, Pilsudski declared, not without justification, that the Diet was despised and hated throughout the country. The object of the constitutional amendment and of the special powers entrusted to the President is to enable the Government to carry through with rapidity the work of legislation which the Sjem has shown itself unable to accomplish. Poland is still subject to three different legis-

¹ Law of 2 August 1926, authorizing the President of the Republic to promulgate ordinances having the force of law.

lative systems, often contradictory to each other and to the constitution; the work of harmonizing the laws of the State has now been entrusted to a special commission. This commission is to prepare full codes of civil and criminal law which are to be accepted *en bloc* by the Assembly.

A further illustration of the legislative incompetence of the Sjem is given by the article of the constitutional amendment dealing with the question of the budget. Hitherto Parliament had shown itself incapable of coming to a decision on the budget before the beginning of the fiscal year. A definite limit of three and a half months has now been fixed for the consideration of the budget by the Diet. At the end of that time the budget is submitted for consideration to the Senate even if the Diet has not yet come to any decision. After an interval of thirty days the budget is again submitted to the Diet. If within that time the Senate has made modifications, the Diet is allowed fifteen days to overrule the decision of the Senate. At the end of this period the President issues the budget as a law whether or not the Diet and Senate have arrived at a definite conclusion. If the Diet has come to a decision the budget is published in the form advocated by that body. If the Senate has reached a decision and not the Diet the version proposed by the Senate is adopted. If neither Diet nor Senate have come to a final decision the budget is promulgated in the form originally proposed by the Government. This does not apply if the Diet has rejected the Government project in its entirety.

In Latvia¹ and Lithuania,² although there is no second chamber, the President has only a very limited suspensive veto. In both countries he may refer a law back to the Seimas for reconsideration. His veto can, however, be overridden, in

¹ Art. 71.

² Art. 50.

Latvia by an ordinary majority, in Lithuania by a majority of the total number of members of the Seimas. In Lithuania this suspensive veto cannot be used when a law has originally been declared urgent by a three-quarters majority. In Latvia ¹ the President has also the right of postponing the promulgation of a law and giving the people the opportunity to demand a referendum. This right, however, lapses if the law is passed again by a three-quarters majority or if it was originally declared urgent by a three-quarters majority. The Latvian and Lithuanian Constitutions are in many respects similar, but the stronger position of the President in Latvia is only one of the many indications of the influence of German thought in that country.

In Czechoslovakia ² the President may return with comments any Bill that has been passed by the two chambers. If it is again passed by both chambers, or by three-fifths of the deputies, it becomes law in spite of the protest of the President. The President has in fact the power to insist on the reconsideration of a measure whenever he thinks this necessary, and also to put an absolute veto on the passing of a Bill by a bare majority of the deputies, when the Senate does not agree.

The powers of the President in Finland are considerable. The strong position of the head of the State in that country can be traced to Swedish rather than to German influence. The underlying principle of the Swedish Constitution is to divide all the powers of State between the various organs of government, not to separate them by giving to each organ a different function. Originally the King and Parliament had both equal legislative and executive powers. Recently the power of Parliament has been considerably increased, and the

¹ Art. 72.

² Arts. 47, 48.

legislative and executive functions have been to a great extent differentiated. Nevertheless the influence of earlier practice is still apparent in the constitution of Sweden, and to a less marked degree in that of Finland. The President in Finland is considered as a partner in legislation, and not as mere organ of control with the right of checking the passage of a law in exceptional circumstances.¹ Every law passed by the chamber must be presented to the President for his approval.² If the law is not approved by the President, it can nevertheless be enforced without his approval, if the chamber, after a new election, readopts it without alteration by an absolute majority. Otherwise the law is regarded as having lapsed. 'If the President does not, within three months, express his approval, he shall be considered to have refused a measure.' These clauses give considerable power to the President. He can, in fact, appeal from the representative assembly to its electors. Only if new elections have shown that the majority of the chamber represented the wishes of the people more truly than the elected President, can the objection of the latter be overridden. The right of the President to demand new elections if he disagrees with the chamber is in theory similar to his right in Germany of appealing to the people by means of a referendum. The Finnish system is, however, likely to work more to the advantage of the President than the German, although at first sight the latter may seem to give him more power. The right of dissolution is always the most effective weapon to use against an elected assembly. Even if the majority sincerely believe that the people would support them about a particular measure if a referendum were called, they will, except in the most important cases, always be reluctant to risk a dissolution. They

¹ Art. 18.

² Art. 19.

will let the matter drop rather than press the President to dissolve, since an election always entails a serious drain on party funds, and the risk of non-election to individual members. In fact the President in Finland has made considerable use of his constitutional powers. On one occasion the President vetoed a law on the grounds that it was a constitutional amendment, but had been treated as an ordinary law. The object of the law was to compel big timber companies to surrender cultivable land to the State. The President's legal advisers considered that it violated the constitutional guarantee protecting private property. The Supreme Court upheld this opinion, which was afterwards accepted also by the Cabinet. It should be observed that the President on this occasion was quite definitely acting against the Government as the upholder of the constitution; he was not using his veto as an agent of the Cabinet.

In Germany the legislative powers of the President are also important; he is the arbiter when the two organs of the legislature, the Reichstag and the Reichsrat, disagree.¹ In such a case, he can, as has already been said, either allow a law to lapse or submit it to a referendum. If it is passed by three-fifths of the Reichstag, he must either promulgate it or refer it to a referendum. He has also the right of veto when a law has been passed by both chambers.² He may postpone the promulgation of a law of which he disapproves, and refer it to a plebiscite for decision. The right of calling a referendum naturally means a great increase of the President's power; on this account it was attacked by the parties of the extreme left, but supported by the Nationalists, and also by the Democratic parties, who were convinced of the

¹ Art. 74.

² Art. 73.

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necessity of devising an effective check on the authority of the representative Assembly.

Some confusion is apparent in the new constitutions as to whether the right of veto is a power to be used independently by the President, or only on the advice of the Government for the time being. The same lack of clearness is apparent in regard to the other powers of the President, with which we shall deal later. Here it can only be said that the right of veto, if it does not become a dead letter, may do much to strengthen the position of the Cabinet as against the Legislative Assembly, and enable the Government to exercise a valuable control over legislation. This seems to be the intention of the Czechoslovak Constitution. It is stated that the Government shall 'decide in session' any proposal made by the President to use his right of veto.¹ In Latvia this right has already been used frequently, and is regarded as a means of preventing hasty legislation by chance majorities in the single legislative assembly.

There can, however, be no doubt that the framers of the constitutions in Germany and Finland² intended the President to act in certain circumstances as an independent power, to appeal from the Assembly to the people, and to refuse to sanction a law, not because the Government disapproved of it, or because it had been passed by a chance majority, but because he considered the majority of the Assembly to have misjudged the real opinion of the people. In Germany it was in fact suggested that the President be allowed to dispense with the counter-signature of a minister when calling a referendum. The intention of the constitution was well

¹ Art. 81.

² Dr. Erich, 'Die Entwicklung des öffentlichen Rechts in Finland', *Jahrbuch des öffentlichen Rechts*, 1922, p. 110.

expressed by the democrat Ablasz. The people are sovereign, they express their sovereignty through certain organs ; the chief of these organs is the Reichstag :

‘But every single human institution and every single constitutional body becomes a source of danger, unless a strong controlling force proceeding from an organ existing side by side with it be set up, which shall compel it to curb its desire for power, whenever it tends to stray on dangerous ground. Bearing this in mind, we have deemed it very necessary to set over against the Reichstag an organ of control, and such is our conception of the office of President.’¹

¹ Session 4 July 1919, Heilfron, p. 3195.

PART V.

PARLIAMENTARY GOVERNMENT

INTRODUCTORY

THE new constitutions have, with one accord, adopted the parliamentary system. The executive functions of government are entrusted to a Cabinet which is responsible to, and must enjoy the confidence of, the elected Assembly.

In Germany, Finland, and Czechoslovakia, a small minority were in favour of the American system, according to which the executive powers are vested in a President, entirely independent of Parliament. The doctrine of the separation of powers has been one of the most obstinate of political fallacies. It lingers still in the idea, prevalent on the Continent, that Cabinet government can work effectively only when a strong independent executive authority stands opposed to the Legislative Assembly. The Cabinet is not considered as an executive committee of Parliament, but as a co-ordinating body, a kind of half-way house between legislature and executive. Nevertheless, the American system was rejected in all the new constitutions by an overwhelming body of opinion. It seemed inevitably connected with the spoils system and the tyranny of parties. With more justice it was argued that such a system necessarily entails frequent deadlocks and makes difficult the efficient functioning of government.

The advocates of the American system were most numerous in Germany, but the supporters of parliamentary government were able to point out that a complete separation of powers would mean the continuation of pre-war conditions with an elected President in the place of the Kaiser, who

hitherto had conducted the affairs of State through the Chancellor, independently of the opinion of the Reichstag.¹ The unsatisfactory condition of the Reichstag under the old system was attributed to the fact that it had no direct influence on the Government and on the administration, and had therefore no adequate sense of responsibility and no opportunity of acquiring practical experience or political insight.² The Government in its turn suffered from lack of direct contact with the will of the people. To the Liberal parties the introduction of parliamentary government had, for years, been the most necessary and immediate reform to be worked for. The disasters of the last years of war and of the peace convinced all parties that no Government could act efficiently that had not behind it the support of the Representative Assembly. Even before the outbreak of the revolution the Emperor had promised considerable concessions; on 5 October 1918 Prince Max von Baden declared that the 'responsibility of Government is too great for any man unless he has the support of the majority of the political chiefs freely elected'; the constitution of 1871 was amended; henceforward the 'Chancellor, in order to continue the direction of the affairs of the Reich, must have the confidence of the Reichstag . . . the Chancellor is responsible for the political acts of the Emperor. . . the Chancellor and his representatives are responsible for the conduct of affairs to the Bundesrat and Reichstag.'³

Recently a reaction against parliamentary government has taken place in certain countries. This is especially the case in Poland, where the system has proved most unsatisfactory.

¹ Adelheit Menschell, *op. cit.*

² Preuss.

³ Dr. Fritz Stier-Sombo, *Die Verfassung des deutschen Reichs vom 11. August 1919*, p. 5.

Pilsudski has been prolific in suggestions for constitutional revision. He has on several occasions advocated the introduction of the American system. The President is to be an independent authority; he is to appoint the Government on his own responsibility without reference to Parliament. 'If the President makes a mistake in the choice of a minister it is easier to remedy this mistake if the Government is not dependent on Parliament and is under no obligation to the various cliques and factions.'¹

At the time when the constitutions were first adopted the difficulties of parliamentary government were not so apparent. The prevailing opinion not only of Germany, but of all the new States seeking an efficient form of popular government, was aptly expressed by a member of the German Democratic Party.

'The best form of expression for democracy is parliamentary government. We know no better, and are therefore determined to introduce parliamentary government as the corner-stone in the foundation of the new building.'²

Parliamentary government means a great access of power to the Representative Assembly; this body is, in fact, entrusted with control of all the powers of State, legislative and executive. Attention has already been drawn to the distrust of these representative bodies, which is characteristic of modern democratic opinion. This distrust is, to a great extent, due to the example of parliamentary government in France. Here, we are told, a Parliament chosen for four years and not dissolved within that period rules with absolute authority; its irresponsibility is shown in the weakness and inefficiency of the Government, in the frequent and useless

¹ Statement by Pilsudski, *Frankfurter Zeitung*, 31 May 1926.

² Session 23 Feb. 1919, Heilfron, *op. cit.*, p. 970.

change of ministry. The framers of the new constitutions, especially in Germany, were anxious to avoid the tyranny of a Legislative Assembly, chosen for a definite period of years and irremovable during that term. We have already seen that in many of these constitutions this distrust of the legislative body led to the introduction of various forms of direct legislation; it was not to be without its effect on the form of parliamentary government. Statesmen in fact found themselves faced with the dilemma of combining a system of checks upon the absolutism of Parliament with one that concentrates all the essential functions of government in that body.

CHAPTER XI

THE PRESIDENT

THE majority of continental constitutional writers, criticizing the French system and contrasting it with that of England, attribute its outstanding evils, the tyranny of Parliament and the instability of Government, to the weakness of the President. Esmein,¹ for instance, in spite of the fact that he actually quotes Bagehot as saying that in England the King is a mere figure-head and the Cabinet a committee of the House of Commons, ascribes the difference of the two systems to the independent position of the constitutional king who constitutes a separate executive authority. Such different writers as Esmein, Duguit,² and Redslob³ agree that parliamentary government can work effectively, as it does in England, only when the head of the State occupies a strong position independent of Parliament. Preuss, largely influenced by these theories and anxious to imitate the English system, declared that a strong popular Parliament required an equally strong popular President: 'I believe that the parliamentary system demands and presupposes such a counterbalancing of powers.'⁴

Democratic sentiment was obviously torn between the fear that the election of the President by the whole people might

¹ Esmein, *Éléments du droit constitutionnel*, vol. i, pp. 153-62.

² Duguit, *Traité du droit constitutionnel*, 2nd edition, vol. ii, pp. 639-47.

³ Redslob, *Die Parlamentarische Regierung in ihrer echten und unechten Form*, p. 120: 'Diese Inferiorität der Executive ist der eigentümliche Charakterzug des Verfassungslebens in Frankreich. Sie gibt die Erklärung für die Besonderheiten des parlamentarischen Regime in diesem Lande.'

⁴ Session 24 Feb. 1919, Heilfron, p. 695.

lead to a repetition of the French experience of 1854, and the desire to set up a strong independent authority as a counterpoise to the Representative Assembly. In Germany and in Finland the latter tendency triumphed; in Yugoslavia the establishment of a constitutional monarchy, under the royal house of Serbia, obviated the difficulty of the election of a head of the State. In Poland and Czechoslovakia the existing French system was followed; and in Latvia, Lithuania, and especially in Estonia, the direct intervention of the people was considered a better safeguard against the tyranny of Parliament than the establishment of a strong presidency.

In Finland¹ the President is chosen by the whole people by indirect election for a period of six years. All the qualified voters choose three hundred presidential electors, who afterwards, by secret ballot, elect the President. If, on the first count, no candidate obtains half the votes cast, a second ballot is held; if still no one attains an absolute majority, a third ballot takes place between the two candidates who have obtained the largest number of votes in the second count. American influence may be traced in the method of indirect election by specially chosen electors, and also in the connexion between the period of the President's office and the parliamentary mandate. As in America, the fact that general elections take place half-way through the term of the President's office is supposed to be a valuable means of checking public opinion. The object of the three ballots is to ensure that the President, when elected, shall not be a mere party man, but shall have behind him the support of the majority of the nation.

Only one presidential election has so far been held. The first President, Dr. Stahlberg, was, by a special provision in

¹ Art. 23.

the constitution,¹ elected by the Constituent Assembly. At the conclusion of his term of office in January 1925 President Stahlberg was repeatedly asked to stand again. If he had done so he would have been certain of re-election. All parties were unanimous in praising his firmness, energy, and independence. He persistently refused, since he considered that the acceptance of a second term of office would be undemocratic.

The method of indirect election has, as in America, proved quite ineffectual as a means of raising the election of the President above party politics. The campaign was carried on on strictly party lines. Since the number of parties was considerable, the final result did not immediately become apparent with the choice of the electoral body. In the first ballot each party put up a separate candidate. In the second ballot the Socialists supported the Progressive candidate, and to the general surprise the Swedish vote was split, the right wing supporting the Finnish Coalition and the left wing the Agrarians. The Communists continued to vote throughout *en bloc* for their own candidate. In the third ballot the Swedes and Coalition Finns voted with the Agrarians. M. Relander, the Agrarian candidate, was therefore elected by a small majority over the Progressive candidate, supported by the Socialists. The Swedish vote was really the deciding factor. It is thought that if the Finnish Coalition had received their whole vote in the second ballot, the Progressive candidate would have obtained the Agrarian vote in the third ballot and been elected.²

According to the constitutions the President is politically irresponsible; his acts must be countersigned by a minister,³ except when he is supervising the administration,⁴ or when he brings an arraignment against a minister or against the Chan-

¹ Art. 94.

² For note see page 182.

³ Art. 34.

⁴ Art. 32.

cellor of Justice.¹ He is criminally irresponsible, except on a charge of treason or of high treason, which, on the decision of a three-fourths majority vote in the Rickstag, must be brought by the Chancellor of Justice before the High Court.²

In Germany also the President is elected by the whole people.³ He is to be the head and representative of the united nation, the guardian of the people's rights, the centre of the Government, the stable element in the constitution. Therefore, he is to be chosen for a long period—for seven years⁴—and by the same electorate as the Reichstag. Both must issue from the same source; then, if one of these organs should fail in its duty to the people, the other will be there to correct and balance. His functions and position demand that the President should have behind him a majority of the whole people. It is hoped that the parties will set up can-

¹ Art. 47.² Art. 47.³ Art. 41.⁴ Art. 43.

Note 2, p. 181 :

<i>1st ballot:</i>	M. Tanner (Socialists)	.	.	.	.	.	78
	M. Relander (Agrarians)	.	.	.	.	.	69
	M. Suolahti (Finnish Coalition)	.	.	.	.	.	68
	M. Soderholm (Swedes)	.	.	.	.	.	34
	M. Ryti (Progressives)	.	.	.	.	.	33
	M. Vasauer (Communists)	.	.	.	.	.	16
<i>2nd ballot:</i>	M. Ryti (Progressives and Socialists)	.	.	.	.	.	104
	M. Relander (Agrarians and Swedes)	.	.	.	.	.	94
	M. Suolahti (Finnish Coalition and Swedes)	.	.	.	.	.	80
	M. Vasauer (Communists)	.	.	.	.	.	16
	M. Tanner	.	.	.	.	.	2
<i>3rd ballot:</i>	M. Relander (Agrarians, Coalition Finns and Swedes)	.	.	.	.	.	172
	M. Ryti (Socialists and Progressives)	.	.	.	.	.	110

18 votes were cast for the Communist candidate; these were treated as spoilt votes, since in the third ballot only the two candidates can stand who received the largest votes in the second ballot.

didates who are more than party leaders, men who will enjoy the confidence of the nation; much is considered to depend on the choice of an outstanding personality.

The American system of choice through electors was deliberately rejected, since it has in that country proved entirely ineffective in cutting across party ties. As a result of the condition of parties in Germany, the difficulty of finding a satisfactory means of direct election was so great that it was postponed for decision by an ordinary law. Election by an ordinary majority would have been simple, but would have meant that the President in most cases would have been the nominee of only a minority of the nation. The Cabinet suggested that if in the first canvass nobody received a majority of votes, a second election should be held in which only the two candidates should stand who had received the largest number of votes. It was, however, objected that a large number of candidates would probably stand, and it would be difficult before the first ballot to form a union of parties, because no party would know the real strength of their candidate. The two elected to stand in the second ballot might therefore have the direct support of only a small minority of the German people.

Eventually a somewhat ingenious scheme was devised. If any candidate obtains more than half of the valid votes in the first ballot he is elected. If no one obtains this number a second ballot takes place. No limit is put on the number of candidates who may take part in the second ballot, and only a simple majority is necessary to secure election. The supporters of the scheme argued that the first ballot would clear the air and enable parties to measure their strength. In the second ballot it was hoped that parties would combine, and that the successful candidate would in fact receive an absolute majority or at least a comparatively large number of

votes.¹ The system is by no means perfect; there is a considerable danger that the electors, thinking a second ballot inevitable, will not take the first vote seriously. This would make it difficult to judge the respective strength of parties, and it would also increase the danger that a group of parties might carry the election of their joint candidate on a small vote by coming to an agreement unexpectedly before the first ballot.

The system has only been put into practice once; the first President—Ebert—was, in accordance with the provisional constitution, elected by the Constituent Assembly on 10 February 1919. He died in office. In the ensuing election, only 68·95 per cent. of the electors voted in the first round, whereas 80·35 per cent. had taken part in the last elections for the Reichstag and 77·3 per cent. finally voted in the second round of the presidential election. On the whole the system worked well. In the first round the Nationalists and People's Party combined and put up Herr Jarres as the joint candidate of the Monarchical Right. All the other main parties acted independently. Altogether there were seven candidates in the field. Herr Jarres received by far the largest number of votes, but failed to obtain the absolute majority necessary for election. Moreover, the returns showed that if the 'Republican parties', the Centre, Democrats, and Socialists, had joined, they would have had a majority over the combined right. The Nationalists and the People's Party therefore tried to shift their ground and find a candidate who would win the support of all the bourgeois parties against the Socialists. In this they failed since Herr Marx, who was again put up by the Centre Party, succeeded in reviving the old alliance of the 'Weimar Coalition'. The

¹ Brunet, *op. cit.*, pp. 158-60.

Democrats and Socialists decided to support him in the second round. The only hope of the right therefore was to find a 'National' candidate who would be welcome to the Bavarians and to the small land unions, who would win the support of those who had not taken part in the first round, and even, it was hoped, detach some votes from the Centre and Democrats. After prolonged negotiations Marshal von Hindenburg was persuaded to stand. In the second round only three candidates took part: Hindenburg, Marx, and the Communist Thälman, and of these Hindenburg and Marx alone had any chance of success. The former was elected by a small majority. If the parties of the left, the Social Democrats and the Centre, had been able to come to an agreement before the first ballot, it is possible that they would have obtained the election of their candidate. The event, in fact, proved that the majority of those who had not voted in the first round eventually gave their voice for Hindenburg.

The election of Hindenburg may very probably prove a turning-point in the development of the German presidency. His chief claim to election was that he alone of Germans could take a position above parties and inspire the confidence and respect of the whole nation. His candidature was opposed by some who thought that he would become a mere figure-head, by others who feared that he would use his constitutional powers as a political weapon in the service of reaction. In fact, he has succeeded most admirably in fulfilling the intention of the constitution. He will, it is hoped, play the part 'of the sleeping lion', of the man who stands on guard above political strife, 'ready in the hour of danger to descend and intervene with utterances of weight in the strife of parties'.¹ If an active politician like Marx had been elected

¹ Deputy Koch, Session 28 Feb. 1919, Heilfron, p. 972.

it is probable that he would have made real and frequent use of the very considerable powers entrusted to the President, and it is likely that the political, as opposed to the constitutional power, and also the political responsibility of the office, would have been increased.

According to the German Constitution the President is criminally responsible and politically irresponsible ¹ in so far as his acts must be countersigned by a minister. He can be criminally prosecuted according to ordinary penal law during the term of his office, only with the consent of the Reichstag. He may, however, be prosecuted for the violation of the constitution or of a law of the Reich by the Reichstag before the Supreme Judicial Court.² The proposal must be signed by at least one hundred members and supported by a two-thirds majority. The constitution does not clearly state whether or not the President is politically irresponsible. His every act must be countersigned by the Chancellor or by the competent minister who thereby assumes the responsibility.³ Nevertheless the President is intended to retain a certain amount of independent power. If he considers that the policy of the Reichstag is contrary to the national interest it is his duty to oppose this policy. In all cases of dispute the ultimate decision rests with the people. If a difference of opinion arises in regard to a particular law it can be submitted to a referendum for separate decision. If, however, a serious difference of opinion arises between the President and the Reichstag, and such a difference leads to an irreconcilable conflict, the people must decide which of these two organs of government they wish to maintain in office. The Reichstag by a two-thirds majority may demand a referendum on the removal of the President before the expiration of his term.

¹ Arts. 43, 50.

² Art. 59.

³ Art. 50.

If the people vote against him, the President ceases his functions.¹ Preuss defended the clause on the grounds that it was the natural corollary to the right of the President to dissolve the Reichstag. 'Both arrangements rest . . . on the same Democratic idea, that the possibility must be provided for of appealing from the elected to the elector.'² If a motion of the Reichstag for the removal of the President is rejected by the people the Reichstag is automatically dissolved. In this case the vote is equivalent to a re-election and the President enters upon a new term of seven years. It was hoped in this way to make the President responsible to the people, but at the same time to give stability to the office and to prevent frequent and unnecessary changes.

In Poland³ and in Czechoslovakia⁴ the distrust of Parliament was less acute than in Germany, and it was decided that the President should be elected, as in France, by a joint session of the two houses of the Legislature. In both countries the term of office is for seven years. In the Polish Constitution⁵ it is stated only that the President must be elected by an absolute majority of the National Assembly. In Czechoslovakia⁶ he must obtain a three-fifths majority. Should two ballots produce no result, a third ballot is held between those two candidates who at the previous balloting obtained the largest number of votes. In Czechoslovakia the parties of the right suggested that the President be elected by the whole people. The centre and left, however, objected that a President chosen directly by the nation as a whole would constitute a danger to popular liberty; a single indi-

¹ Art. 43.

² Session 3 March 1919, Heilfron, p. 112. Also Preuss, *Denkschrift zum Entwurf des allg. Teils der Reichsverfassung*. Reprinted in *Staat, Recht und Freiheit*, pp. 388-9.

³ Art. 39.

⁴ Arts. 56 and 58, par. 2.

⁵ For note see p. 188.

⁶ Art. 57.

vidual entrusted with so high a mandate would attempt to found a monarchy or create a dictatorship.

In Poland the parties of the left, the supporters of Pilsudski, were, in opposition to the right, in favour of strengthening the position of the President. To this end various plans were put forward. The Wyzwoleni suggested that the President be elected by the whole people from two candidates proposed by the Diet.¹ The Socialists and the Workers' Party suggested that a special national assembly, numbering twice as many representatives as the Diet, be chosen exclusively for the purpose of electing the President. All such schemes were rejected. The natural reaction against the arbitrary powers exercised by Marshal Pilsudski during the period of liberation found expression in the articles of the constitution defining the position and duties of the President of the Republic.

¹ Potulichi, *op. cit.*, pp. 40, 41, notes.

Note 5, p. 187:

Art. 39. According to the actual procedure adopted, two ballots are held. If at the first no candidate receives an absolute majority, a second vote takes place at which only the two candidates participate who received the largest number of votes in the first ballot. In May 1926 Pilsudski was elected in the first ballot. The results were as follows:

Pilsudski	.	.	.	292
Buinski	.	.	.	193
Abstentions	.	.	.	61

Pilsudski refused to accept the Presidency; in the ensuing election his nominee, M. Mosiecki, was elected.

1st ballot: Mosiecki . . . 215 Centre, Left Peasant Parties, National Minorities.

Buinski . . . 211 Right, Peasant Party.
Mareck . . . 56 Socialists.

2nd ballot: Mosiecki . . . 281
Buinski . . . 200
Spoiled votes . . . 63

If the recent accession to power of Pilsudski is to be followed by permanent results some change in the method of presidential election will be necessary. The whole purpose of Pilsudski's constitutional amendment is to strengthen the executive as against the Diet. He has repeatedly insisted that this can be done only by giving power to the President. It follows that unless the Diet is to be permanently controlled 'by the crack of Pilsudski's whip', the President must have an independent position and not be dependent for election on the very body which he is expected to control and oppose.

In Latvia, Lithuania, and Estonia, the framers of the constitution were, as in Germany, determined to avoid the tyranny of the Legislative Assembly. At the same time they did not wish to establish a strong independent presidency. In these countries the doctrine of the separation of powers was considered incompatible with the sovereignty of the people:

'Power', it was said, 'belongs only to the sovereign people. Organs of government are entrusted with various functions, but ultimate authority in all branches comes back to the Seimas, the representative in miniature of the sovereign people as a whole.'¹

It was thought that a better safeguard against abuse of power by Parliament would be found in making that body immediately dependent on its electors than in setting up an independent organ of control.

In Latvia ² and in Lithuania ³ the President is chosen by the Seimas, the single Representative Assembly, for a period of three years. The term of the President's office is therefore the same as the parliamentary mandate. In Lithuania,⁴ if the Seimas is dissolved within that period, the President must be

¹ Max Laserson, *op. cit.*, p. 260.

² Art. 35.

³ Art. 41.

⁴ Art. 52.

re-elected. In Latvia ¹ precautions are also taken to ensure that the President is in sympathy with the Seimas. If the President wishes to dissolve and the people in the ensuing referendum vote against him, he is forced to resign and a new election takes place. In both countries the President must be chosen by an absolute majority of the Seimas; three ballots are held. In both cases the constitution states that he is politically irresponsible; ² his acts must be countersigned by a minister; but in Latvia ³ it is expressly stated that he may dispense with this counter-signature when choosing the Prime Minister and when dissolving the Seimas. In both countries the President may be recalled by a two-thirds majority of the Assembly. His political irresponsibility is in fact less complete even than in Germany. In that country, at the instigation of a two-thirds majority of the Reichstag, the people can ultimately recall the President.⁴ This possibility was devised in order to allow the sovereign people to act as arbiters between two strong and independent organs. In Latvia and Lithuania the President has no such strong position, and his responsibility is a sign of subserviency to the Seimas rather than of independent power. It is possible, of course, that his greater responsibility may lead to an increase in political influence. So far, however, it has only had the effect of restraining him in the use of his constitutional functions. He has not, in either country, as yet acted against the majority of the Seimas, and it does not seem probable that he will do so in the future.

In Estonia the office of President has been altogether dispensed with. The 'Riegwanen', or State head, combines the functions of Prime Minister and of President.⁵ 'He

¹ Arts. 50, 58.

² Lithuanian Constitution, Art. 55.

³ Art. 53.

⁴ Art. 43.

⁵ Arts. 58, 59.

represents the Estonian Republic, leads and unifies the Republican Government, and presides over the meetings of the Government. . . .¹ He is elected directly by the Seimas and holds office, not for a fixed period, but as long as he enjoys the confidence of that body.² In Estonia the system, more tentatively adopted in Latvia and in Lithuania, has been pushed to its logical conclusion. In those two countries the President is to such an extent dependent on the Assembly that he is likely to become a mere nonentity or a political tool of the majority. In the latter case his position would be very similar to that of the Prime Minister, the only difference being that he is elected for the duration of a Parliament, and that a larger majority is necessary both to appoint and recall him. In Estonia this unnecessary duplication has been avoided by combining the two offices in one. The framers of the constitution may not have been wise in adopting this system, but at least they have shown themselves more clear-sighted than their neighbours. In Latvia, in particular, the impossible attempt has been made to create a presidency which, in times of emergency, may act against the Representative Assembly, although it owes its authority entirely to that body.

In practice, however, the Estonian system has led to considerable difficulties. Ministerial crises in that country are frequent and prolonged. During these crises there is no head of the State. His place is temporarily filled by the President of the Seimas or Speaker. The result is that the importance of that office has been much increased. The Speaker performs some of the most important functions of a President. Contrary to the intention of the constitution it is he who calls upon the various party leaders and entrusts them with the formation

¹ Art. 61.

² Art. 64.

of a Government. It is thought in many quarters that it would be better to have a President who held office for a fixed term, independent of the varying fortunes of political parties. In 1924 a commission was appointed to consider the possibility of constitutional revision, but the question was eventually shelved owing to the failure of the different parties to agree.

CHAPTER XII

DISSOLUTION

IN accordance with modern democratic theory the right of dissolving the Representative Assembly can be regarded from three different points of view. If the Assembly no longer enjoys the confidence of its electors, the people, either directly or through the President, who represents their interests, may cause a dissolution; if a conflict arises between the Government and the Assembly, the Government before resigning may have the right of appealing to the people for a final decision; if the majority of the Assembly considers that owing to the condition of parties, or for any other reason, the Assembly is not fitted to fulfil its functions, or if they think the opportunity propitious for the renewal of their mandate, the Assembly may dissolve itself. Each of the new constitutions provides for one or other of these forms of dissolution; in some, notably in Germany, an attempt has been made to include them all. Nevertheless the distinction between the different forms of dissolution has never been clearly stated, seldom clearly comprehended. This confusion is to a certain extent due to the fact that whatever the object of the dissolution, the actual right of carrying it out, of dismissing the old Assembly and of ordering new elections, is usually entrusted to the head of the State, the constitutional King or elected President. Except for the usual reservation that he may not dissolve more than once for the same reason, the constitution does not state under what circumstances he may do so or what the object of the dissolution should be.

Although this was not generally recognized, there can be no doubt that the most important application of the right of dissolution is that in which a defeated Government is allowed to appeal to the people against a majority of the Assembly. The degree to which this right is applied in practice may have the most profound effect upon the working of the Cabinet system. The strong position of the Government in England is closely connected with the right of the Prime Minister to claim a dissolution whenever a vote of no confidence is passed, or an important Government measure is defeated. Members are always afraid of the expense and risk of a general election; the threat of a dissolution is the most effectual means of rallying a wayward Government majority.

The weakness of the Government in France may, to a great extent, be traced to the fact that the power of the President to dissolve the Chamber is dependent upon the assent of a two-thirds majority of the Senate. It hardly ever happens that a Government defeated in the Chamber can depend upon such a majority in the upper house. The French system, therefore, is equivalent to one of fixed legislative periods, and the Government, by being deprived of the right of dissolution, loses one of its chief weapons of defence against the Chamber. Instead of being the leader of the Legislative Assembly, as in England, the Cabinet becomes its acknowledged servant and dependent.

In Poland alone, where, as we have already seen, the influence of France predominated, was the French system deliberately adopted. According to the constitution of 1921 the Diet could be dissolved before the expiration of the parliamentary mandate, only by its own vote passed by a majority of two-thirds of those voting, or by the President with the consent of three-fifths of the Senate in the presence

of at least one-half of the total membership.¹ In both cases, the Senate would be automatically dissolved at the same time, and it would therefore be naturally reluctant to use its right of enabling the President to dissolve. The parties of the left fully realized that this arrangement would seriously weaken the Government and tend to establish the absolute rule of Parliament, as in France. The clause was violently attacked, and various amendments were proposed.² The Socialists suggested that the President be empowered to dissolve the Diet, on the demand of the Council of Ministers with the support of one-third of the Diet, or on the demand of five hundred thousand citizens. The Wyzwolenzi also objected to the power of the Senate over dissolution. They suggested that the President be allowed to dissolve on the demand of one-third of the deputies. As late as the third reading of the text of the constitution, the Socialists introduced an urgency motion that the President be allowed to dissolve on the proposal of the Council of Ministers with the consent of three-fifths of the members of the Diet.

The evil results of the fixed legislative period soon made their appearance and led to the demand for constitutional revision. The Diet had no adequate sense of responsibility and lost the confidence of the nation. The Government was continually overthrown without any reference being made to the opinion of the people. According to the amendment of 7 July 1926 the President can dissolve the Diet and Senate before the expiration of their term; the order must be countersigned by the Prime Minister and all the Cabinet.³

¹ Art. 26.

² Potulich, *op. cit.*, p. 31, notes.

³ Law of 2 August 1926, modifying and completing the constitution of 17 March 1921; Art. 4, which is an amendment of Art. 26 of the constitution.

The right of dissolution is definitely considered as a power in the hands of the Government.

It appears that the soundest method was in this case adopted almost by accident. Public opinion generally was in favour of the extension of the right of dissolution. Pilsudski's original intention was, in this and other ways, to increase the power of the President. As the result of the concentrated opposition of the parties of the right and the doubtful attitude of the Socialists he was compelled to modify his scheme. It was thought that a President entrusted with the unrestricted right of dissolving the assembly might be tempted to establish a dictatorship and govern without Parliament. The right of dissolution was therefore made dependent upon the consent of the Cabinet, not because this was considered the best means of strengthening the executive but because it was intended thereby to safeguard the rights of the Assembly.

According to the amended text of the constitution, the Diet has no longer the right to dissolve itself. This was done, not because it was intended for any reason to limit the powers of the Diet in this respect, but simply because the clause in question was one concerning which the Diet and Senate failed to agree. The original project left unaltered the clause of the constitution according to which when the Diet dissolved itself; the Senate was also automatically dissolved. The Senate insisted that the right of dissolving both houses should be extended also to the upper house. The Diet refused to accept this modification and the disputed clause was therefore omitted.

In Germany the author of the constitution, Professor Preuss, deliberately attempted to follow the English model. The President was intended to exercise powers similar to those which Preuss believed to be inherent in the constitu-

tional monarchy. His right of dissolution was to be a real power actually used.¹ When faced by a vote of no confidence in the Reichstag, the ministry should have the right of appealing to the President for a dissolution. That this was the object of the framers of the constitution is made clear by the statements of Preuss² in the Constituent Assembly; the same view is held by commentators such as Brunet.³ Nevertheless, Hoffmann,⁴ Witmayer,⁵ and others have maintained that the right of dissolution is purely theoretical; that the German system will, in fact, be equivalent to one of fixed legislative periods, and entail the domination of the Legislative Assembly as in France. The fact that all political acts of the President must be countersigned by the Prime Minister, himself the nominee of the majority in the chamber, is supposed to nullify all possibility of independent action. A ministry defeated in the Reichstag would, if it sought refuge in a dissolution, be at once faced with a vote of no confidence and compelled to resign, before the dissolution could be carried into effect. For the President to maintain in office, even for

¹ Preuss, Session 24 Feb. 1919, Heilfron, pp. 696 seq.: 'Der Präsident kann den Reichstag auflösen. . . . Aber dem steht das Korrelat gegenüber dass auch der Reichstag das Recht hat, dem Präsidenten gegenüber von dem Gewählten an die Wähler zu appellieren. Ich glaube dass diese beiden Befugnisse. . . . sich gegenseitig ergänzen und jedenfalls nicht die eine ohne die andere aufrecht erhalten werden könnte.'

² e.g. Preuss, Session 3 March 1919, Heilfron, p. 112.

³ Brunet, *op. cit.*, pp. 166-8.

⁴ E. H. Hoffmann, 'Die Stellung des Staatshauptes zur Legislative und Executive', *Archiv des öffentlichen Rechts*, Neue Folge, 7. Band, 3. Heft, 1924, p. 257.

⁵ Witmayer, *Weimarer Reichsverfassung*, p. 319: 'Die einmalige Auflösbarkeit des Reichstages durch den Reichspräsidenten wird infolge des Erfordernisses der Gegenzeichnung kaum je in praktische Wirksamkeit treten.'

a short period, a ministry from whom the confidence of the Reichstag had been withdrawn, and further, to undertake under their auspices such an important act as a dissolution, would be altogether contrary to the spirit of the constitution. This difficulty was in fact foreseen by the deputy Anschütz,¹ who suggested that when dissolving the Reichstag, as when appointing the Chancellor, the President should be allowed to dispense with the counter-signature of a minister. Preuss answered that this would be incompatible with the principle of ministerial responsibility.

If the right of the President to dissolve at the request of a defeated Government is uncertain, even more doubtful, according to the letter of the constitution, must be his right to dissolve in defiance both of the Government and of a majority of the Assembly. That the President should exercise this right is, however, the undoubted intention of the constitution.² He is to be the counterpoise to the Assembly, the guardian of the rights of the people as against the Reichstag. If, in his honest opinion, the Reichstag no longer represents the wishes of the German nation, his duty is to dissolve, whatever the opinion of that Assembly or of its majority. In this capacity he is to fulfil the function entrusted in many of the German States to a popular initiative. The dissolution of the Reichstag, against the wish of the Government, can only be legally carried into effect by dismissing the existing

¹ See Adelheit Menschell, *op. cit.*

² Dr. Ablass, Berichterstatter: 'Der Reichspräsident muss die Möglichkeit haben, wenn er nach bester Ueberzeugung davon ausgeht, dass der Reichstag mit seinen Beschlüssen auf falschem Wege steht gegen den Reichstag zu appellieren. Das ist demokratisch, und gegen den Appell an das Volk wird sich ein guter Demokrat nicht wehren können.'—*Bericht und Protokolle des Verfassungsausschusses der Weimarer Nationalversammlung*, p. 233.

ministry and appointing another, willing to countersign the order and undertake the responsibility. Preuss saw in this no diminution of the President's actual power of dissolution, but only a safeguard against its abuse. As a result the President can only dissolve if at least one party can be found willing to undertake the responsibility.

Preuss's meaning is clear if we read his speeches, and he was in fact successful in convincing the Assembly; his intention, however, is not so plain if we follow the actual text of the constitution. It would have been wiser to draw a clear distinction between those cases in which the Government has the right of dissolution and those in which the President dissolves on his own initiative; much confusion would also have been avoided if the principle of consistent ministerial responsibility had been sacrificed to clearness and the President allowed, as in Latvia, to dispense with the countersignature of a minister when dissolving Parliament.

A fixed written constitution may have great advantages, but not the least of its drawbacks is the raising of small, but not of necessity unimportant, issues of this kind, issues which are passed over quite naturally in the broad outlines of English constitutional practice. In England it would be impossible for a Government to remain in office for any length of time in the face of the opposition of a majority of the House of Commons. It is therefore taken for granted that a Government defeated in the House will resign. But the written stipulations to this effect in the German and other continental constitutions might quite possibly lead, as was indeed foreseen by Preuss,¹ to a scarcely dignified race between the President to dissolve and the Reichstag to pass a vote of no confidence.

¹ Hoffmann, *op. cit.*

So far the issue has not been raised in practice, but the fears of those who considered that the German system would be equivalent to one of fixed legislative periods have been to a certain extent justified. Although the Government has changed frequently, the legislative period has on the whole been long. The Constituent Assembly was dissolved hurriedly as a result of the *coup d'état* of Kapp and Lutwitz in 1920. The Reichstag then elected remained in office for almost the full term of four years. New elections followed the presentation of the Experts' Report in May 1924. The political situation remained so obscure that the Assembly was again dissolved in December 1924. On each occasion the President, the Government, and the majority of the Assembly were agreed as to the necessity for new elections. In the ordinary course of events defeated ministries have not demanded a dissolution.

Both in Latvia and Lithuania, despite the fact that in the latter country the signature of a minister is necessary, the right of the President to dissolve is obviously not intended as a weapon in the hands of the Government, but as an independent power which the President is entitled to exercise when he considers that the Seimas no longer enjoys the confidence of the people. That the head of the State is not supposed to dissolve automatically at the request of a defeated Government, as in England, is made clear by the fact that if he miscalculates the opinion of the country he jeopardizes his own position. In Lithuania¹ a dissolution is followed by a new election of the President; in Latvia,² if the referendum which decides whether a dissolution shall take place goes against the President, he automatically resigns. This stipulation will inevitably be a deterrent to the free

¹ Art. 52.

² Art. 50.

exercise of the right of dissolution. As in Poland the Senate would have sealed its own fate by allowing the Sjem to be dissolved, so the President in Latvia and Lithuania runs the risk of losing his own mandate when he dissolves the Assembly.

In Finland the power of the President to dissolve is more real. His position is independent and the intention of the constitution is that he shall dissolve whenever, in his opinion, the interests of the nation demand that new elections should be held.¹ In 1924 President Stahlberg did in fact dissolve the Rikstag in spite of the opposition of a Government which enjoyed its support. Twenty-seven Communist deputies had been put under arrest, and the parties of the left maintained that the 'Rump Diet', as they called it, no longer represented the nation. The President upheld this point of view against the opposition of the Government and the majority of the Assembly.

In Yugoslavia² and Czechoslovakia³ the system in force more closely resembles the English. The difficulty as to the right of dissolution and the vote of no confidence which aroused so much discussion in Germany does not seem to have troubled a less meticulously logical people. The right of dissolution is clearly intended as a weapon in the hands of the Government for the time being; there is no indication in the constitution that the head of the State is intended to use his own judgement and in certain circumstances to dissolve in opposition to the Government. Nevertheless in Yugoslavia the King has shown a considerable amount of independence. He has adopted the point of view that if he cannot dissolve without the consent of the Cabinet, neither can he be com-

¹ Dr. Erich, *op. cit.*, *Jahrbuch des öffentlichen Rechts*, 1922, p. 110.

² Art. 52. Note: A royal decree to dissolve the National Assembly must be signed by all the ministers.

³ Art. 31; also Art. 64, (1) d.

pelled to do so against his own better judgement. In 1924 he repeatedly refused to dissolve at the request of M. Pasić, the head of the Radical Minority Cabinet. The King considered that new elections would not solve the political deadlock, but that an election campaign would only embitter political hostility.

An interesting light is thrown on the question of dissolution by a consideration of those constitutions that have altogether dispensed with a separate head of the State, to whom this function is traditionally entrusted. Of sovereign States, Estonia alone has adopted this system. The framers of the constitution were considerably influenced by Switzerland; in imitation of that country they quite deliberately did not give the right of dissolution to the collegiate ministry, in which are combined the functions of head of the State and executive Cabinet. In Estonia the Assembly is directly dependent on the people, and the Government on the Assembly. If a vote of no confidence shows that the Government no longer represents the opinion of the Assembly it resigns;¹ in the same way, the Assembly is automatically dissolved whenever the result of a referendum shows that it no longer represents the opinion of the nation.² The Government is definitely considered as the servant and not as the leader of the Assembly, in the same way as the Assembly is the servant of the sovereign people.

A somewhat similar form of government is found in most of the separate States of the German Reich. Here, too, a President was dispensed with, not as in Estonia,³ because the office was considered undemocratic, but because difficulties

¹ Art. 64.

² Art. 32. See above, p. 136.

³ R. T. Clark, 'The Constitution of Estonia', *Journal of Comparative Legislation and International Law*.

might arise between the heads of the separate States and the President of the Reich.

The constitution of the Reich demands only that the State Governments shall be republican and parliamentary. It was, however, suggested by the Government of the Reich at the time of the adoption of the constitution that the Swiss collegiate system, unsuitable for a large empire, might profitably be applied to the member States.¹ It is, in fact, to the Swiss model that these Governments most nearly approximate. Nevertheless, distrust of parliamentary absolutism was sufficiently strong to prevent the whole-hearted adoption of the Swiss system. Direct legislation was not considered a sufficient guarantee against this absolutism; it was thought necessary to provide ample means for the renewal of the Assembly during the ordinary legislative term. The constitutions of the German member States are interesting from this point of view because, owing to the fact that there is no head of the State to whom the right of dissolution can be entrusted, they have been compelled to devise new methods. For the same reason a more clear distinction has been drawn between the different forms of dissolution than in the other new constitutions.

In Prussia the Diet may dissolve itself by the vote of a majority of the legal members.² A dissolution may also be brought about by the people.³ A petition may be presented by a fifth of the electors for the dissolution of the Landtag. A referendum then follows, and if passed by a majority of those qualified to vote, the Landtag is dissolved. A similar provision is found in the other States. In Württemberg⁴ only a majority of those voting is necessary to bring about a dis-

¹ Adelheit Menschell, *op. cit.*

² Art. 14.

³ Art. 6, 1 and 6.

⁴ Art. 16, pars. 1, 2. Text of constitution published in *Jahrbuch des öffentlichen Rechts*, 1921.

solution. In Bavaria¹ at least half the electors must take part, and a two-thirds majority is necessary. On a superficial consideration the plan seems highly democratic. The Representative Assembly is the acknowledged servant of a sovereign people; therefore, if it has lost the confidence of the people, the people itself should have the right of recall. If, however, we look more carefully into the question, it becomes apparent that the popular initiative is a most inadequate means of guarding against the absolutism of the Assembly. It is very improbable that in a State like Prussia, especially considering the limited nature of the powers remaining to the State Government, such a revolution in public opinion should take place within four years, that a fifth of the electors should be found to sign a petition for dissolution, and that in the ensuing vote the necessary majority should be obtained. The initiative is essentially a measure to be used in exceptional circumstances only, and, as we have seen, the efficient working of Cabinet government depends very largely on the right of the ministry to demand a dissolution at any time, in defiance of the opposition of the Assembly. In several of the States, in Bavaria, Thuringia, and Mecklenburg-Schwerin, this right, even in theory, is denied to the Government. This was done deliberately, although it was actually suggested that the Government should be allowed either to dissolve the Assembly or to submit the question to a referendum, because the Government was conceived as a body chosen by and in every way subservient to the Landtag.² In

¹ Art. 10, pars. 1, 2. See Robert Piloty, 'Die bayerische Verfassung vom 14. August 1919', *Jahrbuch des öffentlichen Rechts*, 1920, pp. 129-62.

² Adelheit Menschell, *op. cit.* The original draft of the Bavarian Constitution had given to the Government the right to call a referendum on the dissolution of the Diet; and see Hoffmann, *op. cit.*, pp. 276-7.

Prussia the original draft of the constitution gave the right of dissolution to the Government. This clause was afterwards modified because it was thought illogical that a body which emanates from the Diet, and is in fact its executive committee, should be given the right of dissolving the Assembly to which it owes its own existence. According to the final text of the constitution the power of the Government is made ineffective by the fact that the Chancellor exercises the right only in conjunction with the President of the Landtag and of the Staatenhaus.¹

In some of the other States, however, a different point of view has been adopted. In Württemberg,² Hamburg,³ Oldenburg,⁴ and Saxony,⁵ the Government can call a referendum as to whether the Landtag shall be dissolved. German constitutional writers, such as Hoffmann,⁶ consider that this right will be ineffective except where precautions have been taken to prevent its use being forestalled by a vote of no confidence and the resignation of the Government. This has in fact been done in all the States mentioned, except Württemberg. In Hamburg,⁷ if the Senate has lost the confidence of the Bürgerschaft, 'it has the right to call a referendum as to whether it shall resign or whether new elections for the Bürgerschaft shall be held'. In Oldenburg,⁸ 'if the Landtag with draws its confidence from the State ministry, it either resigns or dissolves the Landtag'. In Saxony⁹ the position of the ministry is, according to the constitution, strongest of all; it

¹ Art. 14, 1. See Aubrey, *op. cit.*, pp. 87-8.

² Art. 16.

³ Art. 36. Text of constitution published in *Jahrbuch des öffentlichen Rechts*, 1921.

⁴ Section 40, par. 6 et seq.

⁵ Art. 9.

⁶ Hoffmann, *op. cit.*

⁷ Art. 36, par. 3.

⁸ Section 40, par. 6.

⁹ Arts. 9, 27 par. 3, 35. See Walter Schelder, 'Die Verfassung des Freistaates Sachsen', *Jahrbuch des öffentlichen Rechts*, 1921.

can call a referendum at any time on a law, or on the dissolution of the Landtag, and 'if the ministry has decided to call a referendum, the resignation of the ministry cannot be demanded, or a vote of no confidence passed, until the vote of the people has taken place.'

In England the right of dissolution not only helps the Government to ward off a vote of no confidence, and a consequent change of ministry; it also secures to the Cabinet the possibility effectively to carry through its legislative programme. This is a conception alien to foreign constitutional law. Although of course the refusal of the budget or of any other really important measure would be considered as tantamount to a vote of no confidence and lead to a resignation of the Government, we find nothing akin to the English habit of making every Government measure a matter of confidence. In England this absolute control of the Cabinet over legislation is of course a natural result of the unrestricted right of the ministry to dissolve, and its absence on the Continent is only another illustration of the fact that the right of dissolution is considered as an exceptional measure and not as a regular instrument in the hands of the Government.

In practice it might be thought scarcely necessary to provide the Government with such a weapon, since party ties are in general even more strictly binding on the Continent than in this country, and there would therefore seem little danger of members acting independently in refusing particular Government measures. It must, however, be remembered that parties, although more cohesive, are smaller and more numerous. It is almost impossible for one to gain an absolute majority, and in all continental countries coalition ministries are the general rule. Not the least of the drawbacks of a coalition is the inability of the Government to

carry through effectively any one plan of legislation. Every important measure is discussed before introduction into the Assembly, not only in the Cabinet, but also in separate party conclaves. A compromise has to be reached that will satisfy all the parties that form the Coalition Government. Often such a compromise entails the complete transformation of the measure, or its abandonment to prevent a split in the Government. If the Prime Minister could threaten not only the official opposition, but the opposition in his own Cabinet, with an unwelcome dissolution, it would do much to bring about Government solidarity.

A general consideration of the question shows that although one of the chief guiding forces of the new democratic movement was a growing distrust of Representative Assemblies, and the desire to introduce direct action by the people, the greater number of the new constitutions failed in the most essential point to guard against the absolutism of these Assemblies. They concentrated on devising checks on their legislative authority, but did not establish efficient means of securing dissolution during the legislative period. Where such means of dissolution is introduced, with practical possibility of carrying it into effect, it is more often as an emergency measure, to be used in case the Assembly has lost the confidence of the people, than as a weapon in the hands of the Government. The right of dissolution entrusted to the people or to the President, the direct representative of the people, would seem theoretically a more secure safeguard against the tyranny of a Representative Assembly, than the right of dissolution in the hands of the Cabinet, themselves the representatives of the majority of that Assembly. In practice the very opposite is the case. The right of dissolution in the hands of the people, or of the President, or of

the second chamber, becomes one of those emergency safeguards of the people's rights, to be used only in exceptional cases, and therefore, in fact, never used at all. It is indeed unlikely that the opinion of a country will change so radically within the legislative period that the people in practice will make use of their power, or the President take the responsibility of dissolving. The right of dissolution in the hands of the Government is a very real right, used whenever a sensible change in opinion is felt in Parliament, whenever an important new departure in policy is to be made, or whenever a change in Government takes place.

CHAPTER XIII

THE FORMATION OF THE CABINET ACCORDING TO THE CONSTITUTION

The appointment of the Cabinet.

IN a parliamentary State the ministry must enjoy the confidence of the elected Assembly. On this corner-stone rests the whole principle of parliamentary government. Its object is to ensure that the legislative and executive powers are co-ordinated and brought into harmony. All the new constitutions provide that the Government shall be responsible to the Assembly, and, except in the case of Finland, it is expressly stated that it must resign on a vote of no confidence. This essential fact accepted, Cabinet government may develop in many different forms.

The actual appointment of the Government is, apart from the right of dissolution, the most important function usually entrusted to the President or constitutional monarch. Many continental constitutional writers, in fact, consider the existence of a separate executive authority entrusted with choice of the ministry as an essential part of the system. There is, however, great divergence of opinion as to how far the appointment of the ministry by the head of the State is a merely formal act, and how far, within the limits stated above, he can use his own discretion and follow his own initiative.

The modern tendency, as has been already stated, is to reject the French system, according to which the President merely ratifies the decision of the Assembly, and to give

greater independent power to the head of the State. This tendency rests to a certain extent on a false interpretation of the English Constitution. In England the power of the King is not really personal. He appoints as Prime Minister the leader of the party commanding a majority in the House of Commons; the other members of the Cabinet are chosen by the Prime Minister and appointed to their various offices by the King on his recommendation. The King retains some vestige of freedom in the choice of the actual person of the Prime Minister. He must be one of the leaders of the majority party, but especially when that party can boast the membership of more than one man of outstanding influence and capacity, or again, when amongst mediocrities no one individual has won a commanding position, he can himself decide who is the most fitting to form a Government and undertake the duties of Prime Minister. It is supposed that on the Continent, where parties are small and coalition ministries common, the influence of the head of the State in this respect will be greater even than in England. He will decide which of the various groups or parties composing the majority shall form the centre of the Government, which individual shall be entrusted with the formation of the Cabinet. It should, however, be noticed that according to the practice of the constitution, the right of the King in England, even within this narrow sphere, to make his own choice seems to be diminishing. He does not choose the Prime Minister, but appoints the nominee of the majority party. If doubt exists as to who is the leader of this party, the decision is taken by a general party meeting, or by a conclave of leaders, not by the King.

This interpretation is, however, not usually accepted on the Continent. We have already spoken of the influence of

writers such as Redslob on the framers of the new constitutions. Redslob considers that true parliamentary government such as exists in England presupposes the right of the head of the State to choose and to dismiss the ministry. The weakness of the Government in France is due to the fact that the rights of the President are purely theoretical; the ministry is appointed by the Chamber alone, and has therefore no independent source of authority.¹ The right of dismissal is, of course, bound up with the independent right of the President to dissolve in defiance of the Government and of the parliamentary majority. The ultimate decision rests with the people, but the President can appeal to the people against the Government. The insistence on this point is remarkable, since in England, which is taken as the model, there is no recent instance of the King dismissing a ministry still in possession of the confidence of the House of Commons, calling another Government to office, and then bringing about a dissolution. The King made the last successful

¹ Redslob, *op. cit.*, p. 5: 'Das Staatshaupt kann das Ministerium stürzen und durch ein anderes ersetzen. Diese Gewalt ist eng mit derjenigen der Auflösung verknüpft. Wenn nämlich das Staatshaupt die Regierung abberufen will, die über die Kammermajorität verfügt, so muss es notwendig neue Wahlen ausschreiben um diese Majorität zu ändern. Je nach dem Erfolg dieses Unternehmens wird es sich des bisherigen Ministeriums entledigen können, oder gezwungen sein es beizubehalten.' Also Redslob, p. 94: 'Wir wissen dass der König von England nur zwei wahrhaft persönliche Kompetenzen besitzt, die ihm erlauben eine freie Initiative zu üben. Er ernennt den Ministerpräsidenten. Weiter, er kann die Regierung stürzen; eine Machtbefugnis die eng mit der Auflösung verbunden ist.' And Esmein, *op. cit.*, vol. i, p. 160: 'Le gouvernement parlementaire comporte aussi normalement pour titulaire du pouvoir exécutif une prérogative spéciale de la plus grande importance, qui lui permet de réagir contre une majorité de la Chambre populaire qui voudrait lui imposer un ministère et par conséquence une politique déterminée.'

attempt to assert his own will in the choice of a ministry when Pitt was called to office by George III in 1782; in 1834 the action of William IV was considered unconstitutional, not because after the dissolution the elections showed that he had misjudged the opinion of the nation, but because he had exceeded his powers in calling Peel to office when the Whigs still commanded a majority in the House. The question is not one that can be clearly stated in a constitutional law; it belongs rather to the realm of practice and tradition. There can, however, be no doubt that in those countries where the head of the State has been given the independent power of appealing to the people by a dissolution, this power carries with it, at least theoretically, the right of dismissing and appointing a ministry on his own initiative, dependent of course upon the ratification of the people. Such a power can more easily be entrusted to an elected President who, if he makes a mistake in judging the wishes of the nation, can be removed without an alteration of the constitution, than to a hereditary monarch, any important criticism of whose actions must lead to a serious constitutional crisis.

There can be no doubt that this view was accepted in Germany. Preuss was particularly influenced by the writings of Redslob and Duguit. He was convinced that the evils of the French system could be avoided only by giving to the President a strong position independent of Parliament, and by making the Cabinet a co-ordinating body between these two separate authorities.

‘The French system can be described as a defective form of parliamentary government; the true parliamentary system presupposes the existence of two essentially equal organs of government. Nevertheless it differs from the dual system in so far as these two opposing organs are not disconnected, but are joined by the

parliamentary government which forms an adjustable link between them.'¹

He thought that in this way the English system would be imitated, but at the same time improved and made more democratic, since the hereditary monarch would be replaced by an elected President, the direct representative of the sovereign people.

Not only is the President to exercise his discretion in choosing the person of the Chancellor, but his right of dismissal is to be a real right actually used. If the President at any time considers that the policy of the Government is contrary to the will of the people or harmful to the interests of the nation, he can dismiss the ministry, dissolve the Reichstag, and give the people the opportunity of choosing a new Government. He would be in a particularly strong position to do so if the result of his own election should show that the opinion of the people had changed since the last general election. It seems to be the intention of the constitution that, although the President is to stand above parties, a certain degree of political harmony shall be preserved between the Reichstag and the President.

'The President shall have power to dissolve the Reichstag and to create a new prop for the Government, if his election has gone to prove that he may expect from a new Reichstag support for a Government which will be more in conformity with his will, and with that to which the people have just given expression, than the existing one.'²

It is obvious that since the countersignature of the Chan-

¹ Preuss, *Denkschrift zum Entwurf des allgemeinen Teils der Reichsverfassung*. Reprinted in *Staat, Recht und Freiheit*, p. 387.

² Dr. F. J. Wuermeling, 'Die rechtlichen Beziehungen zwischen dem Reichspräsidenten und der Reichsregierung', *Archiv des öffentlichen Rechts*, Neue Folge, 11. Band. 3. Heft, p. 341.

cellor is necessary for the dissolution of the Reichstag, the independent right of the President to dissolve would become entirely ineffective unless he had the right to dismiss a Government which had the support of a majority of the Reichstag. This point was foreseen by Preuss, who stated quite distinctly that in such circumstances the President would be able to dismiss the Government and choose one from the minority of the Reichstag for the purpose of carrying through the dissolution.¹

It remains to be seen whether in practice the President will be willing or able to make use of his constitutional powers. Many German constitutional writers have denied the power of the President to act independently against the majority of the Reichstag. So far no instance has occurred in which he has done so. The difficulties inherent in a fixed written constitution have already been alluded to. These are increased by the fact that the framers of the new constitutions have not expressed themselves sufficiently clearly. If a form of government is to be definitely laid down and stated in a constitutional document, this must be done in considerable detail. There seems no adequate reason why modern constitutions should always follow the traditional legal form which was originally devised to give expression to the main outlines of English constitutional practice, but which for that very reason does not give any direct statement in regard to some of the most important questions of the distribution of political authority. The provision that the acts of the President must be countersigned by a minister may be interpreted in many different ways. No distinction is drawn between those cases in which the President is expected to act as an agent of the Government and those in which he is intended

¹ Preuss, *Verfassungsausschuss. Prot.*, pp. 237, 252.

to use his own discretion. As a result of this vagueness a mass of literature has sprung up, the constitution is interpreted in many different ways, and if we wish to understand the intention of its framers we are compelled to turn, not to the document itself, but to the statements made in the assembly and in the constitutional committee.

The right of the President to act against the majority of the Assembly is one that he is intended to use only in exceptional circumstances. For this very reason it was all-important that it should be clearly stated in the constitution. A right of this kind if not frequently exercised is forgotten and even denied. If in Germany the President made real use of his powers he would probably raise a storm of opposition and cause a constitutional crisis. Although it was the undoubted intention of the framers of the constitution that he should be entrusted with this right, he would be accused by the majority of politicians and by a considerable section of legal opinion of having acted unconstitutionally. During the ministerial crisis of June 1924 the former Chancellor, Marx, maintained that until the Government had resigned 'the President was not in a position, and was not authorized, nor did he ever consider himself authorized, to take any steps towards the formation of a cabinet.'¹

Nevertheless the President has not been without influence on the formation of the Cabinet. The hope has been expressed, especially by Conservative opinion, that he will in the future make more real use of his rights. Minority Governments in Germany have been frequent; it is thought that the President should be in a position, by a dissolution of the Reichstag, to bring about a change of ministry and change a minority into a majority Government.

¹ Debate in Reichstag, Session of 5 June 1924.

In Finland the position of the President is in many ways peculiar. This is due chiefly to the influence of Swedish constitutional law.¹ In Sweden the introduction of parliamentary government is a very recent development.² The constitution itself provides for the establishment of two equal authorities, the Rikstag and the King. The King has independent executive power; he is irresponsible, and his acts must be countersigned by a minister, but the minister, according to the constitution, can refuse his countersignature only when a proposal of the King is contrary to law or to the constitution. The King must ask the advice of the Council of Ministers, but he need not follow it. Until recently, the King did, in fact, pursue his own policy; he naturally chose ministers who were looked upon favourably by the Rikstag, but he was not bound to limit his choice to the parliamentary majority. Governments were formed on non-party lines. The constitution provides for the political responsibility of ministers only to a limited degree; in practice, however, the Rikstag adopted the habit of interrogating the ministers on the conduct of affairs and passing a vote of no confidence in a Government of which it disapproved; it naturally became difficult for the King to keep such a ministry in office. The last occasion on which he exercised his own authority in the choice of a Government was during the war, in 1914, when the Hammash-Joeld ministry was called to office and remained in power until 1917, in spite of the opposition of a Liberal majority in the Rikstag. Since then the practice of parliamentary government has been followed;

¹ See text of Swedish Constitution, Dareste, *Les Constitutions modernes*, vol. ii.

² Redslob, *op. cit.*, pp. 93 et seq.; also Jahlbech, *La Constitution suédoise et le parlementarisme moderne*, 1905.

ministries have been formed on party lines and have been changed when new elections caused a change of political power in the Rikstag.¹

The new Finnish Constitution has borrowed much from the actual text of the Swedish. The complicated clauses which in the latter provide that the Rikstag, by means of the constitutional committee to which are presented the minutes of the Council of State, shall exercise some control over the action of ministers and be enabled to petition for their removal, have been omitted.² There has been introduced instead the simple statement that members of the Council of State 'must enjoy the confidence of the chamber of representatives'.³ Parliamentary government has rather tentatively been introduced into the text of the constitution. It is not clearly stated whether the Cabinet is responsible only to the Rikstag or to both Rikstag and President. The constitutional point was raised after the election of the new President in 1925. In some quarters, especially among the parties of the right, it was maintained that the Cabinet held their mandate from President Stahlberg; with his retirement this mandate ceased to exist. They should, therefore, resign and place their posts at the disposal of the new President. The left insisted that the Cabinet owed responsibility only to Parliament; therefore to dismiss a Government which still had the confidence of the Reichstag would be unconstitutional. Eventually the problem was avoided by a compromise. The Cabinet did not resign, but at the first meeting which he attended the new President expressed his confidence in

¹ A. Reuterskeold, 'Die Verfassungsentwicklung Schwedens', *Jahrbuch des öffentlichen Rechts*, 1922.

² Constitution of Sweden, Art. 107.

³ Constitution of Finland, Art. 36.

the Cabinet and asked them to remain in office as long as the situation remained unchanged. The left and centre parties were not altogether satisfied with this solution, which they considered derogatory to the rights of Parliament.

There are also clear indications in the Finnish Constitution that the President is intended to play an active and independent part in the government of the country. The powers of the head of State, as in Sweden, are not limited to the appointment and dismissal of the ministry; he does not, as in England, become an inactive organ during the term of office of a Government. A distinction is made in the constitution between those functions that belong to the President and those that are entrusted to the Council of State. 'The Council shall have power to execute the decisions of the President, and to decide matters which it must decide under the terms of law, as well as other questions of government and administration which have not been reserved to the President in the present constitution or in any other law or ordinance.'¹ The functions of the President, according to the constitution,² include the initiation of laws, the exercise of the veto, the summoning and dissolution of the Reichstag, the issuing of ordinances, the granting of pardons, and the conduct of foreign affairs. That within these spheres the President is expected really to use his own discretion is clear from the fact that the Council of State cannot act except in the presence of the President. 'The decisions of the President shall be made in the Council of State.'³ In order to be valid, the decisions of the President must be signed by the President of the Council and countersigned by the minister who is in charge of their execution,⁴ but, according to the text of the constitution, a minister can refuse to sign only when a pro-

¹ Art. 41.² Arts. 13, 27, 28, 29, 33.³ Art. 34.⁴ Art. 34.

posal is contrary to law.¹ The Council of Ministers can act without the participation of the President only in certain spheres, the most important being the conduct of the general administration of the State. It is stated in the constitution, not that the ministers are responsible to the Chamber of Representatives, but that they 'are responsible to the Chamber of Representatives for their administrative acts'.² Even where the administration is concerned, the President has power of control. 'He shall supervise the administration of the State, and for this purpose he may demand explanations from the chiefs or directors of the administrative services and public institutions, and he may cause inspections to be made.'³ When exercising his rights under this clause, he is freed from the necessity of the counter-signature of a minister, and also when he decides to bring an arraignment against a member of the Council of State.⁴

Time alone can show whether the provision that he must choose ministers who enjoy the confidence of the Rikstag will enable the President to occupy the independent position intended for him in the constitution. Much, of course, will depend upon the condition of parties and upon the personality of the President. There can, however, be no doubt that the first President, Dr. Stahlberg, did much to justify the framers of the constitution. He played an active and valuable part in the government of the country, and helped to give a certain stability to Cabinets formed under very difficult conditions of party politics. The Finns have made an attempt to combine parliamentary government with the establishment of a separate legislative and executive authority, each enjoying an equal and independent position. Constitutional writers such as Redslob consider that true parliamentary government consists in such 'a dualism of forces which is

¹ Art. 35.² Art. 43.³ Art. 32.⁴ Art. 34, par. 2.

brought back to unity by the dissolution of Parliament, and the decision of a sovereign people'.¹

In Latvia and Lithuania there are also indications that the President was intended in certain circumstances to play an independent part and act against a majority of the Assembly. It is very doubtful whether the President, considering the extent to which he is dependent on the Assembly, will be able to do so in practice.

In Poland, Yugoslavia, and Czechoslovakia, according to the constitution, the right of the head of the State to use his own discretion does not go farther than occasionally to choose between individuals when the leadership of a party is disputed, or, in times of crisis, to instruct a particular party leader to attempt the formation of a coalition. When once a ministry is appointed it can be dismissed only if the confidence of Parliament is withdrawn.

In Estonia² and in the German member States,³ where there is no President, the Government is, according to the constitution, chosen directly by the Representative Assembly. An attempt has been made to imitate the Swiss system, with the difference that the Government is not chosen for a fixed period, but is at all times directly and immediately responsible to the Assembly. Many foreign constitutional writers would deny the name of parliamentary government to this collegiate system. We have, however, already indicated that the essential element in parliamentary government is not the existence of a separate legislative and executive authority co-ordinated by the Cabinet, but the provision that the Govern-

¹ Redslob, *op. cit.*, p. 108.

² Art. 59.

³ e.g. Constitution of Prussia, Art. 45; Constitution of Saxony, Art. 5. A new ministry must be formed whenever new elections for the Landtag take place (Art. 26, par. 3).

ment, however chosen, must enjoy the confidence of the Legislative Assembly.

It was suggested in Estonia and also in Prussia¹ that the Prime Minister should be actually nominated by the Speaker of the Chamber. In practice this method has been adopted; it was deliberately rejected in the constitution, since it was thought that to give to the Speaker such an important function would make him a President of the State in disguise. Moreover, the Speaker in these countries remains a politician; he is not raised above the strife of parties, and was not therefore considered a fit person to be entrusted with the appointment of the Government.

The Relations between the Prime Minister and the other Members of the Cabinet.

Not less important than the actual method of appointment of a Government is the relation, when in office, between the Prime Minister and the other members of the Cabinet. In England no clearly stated rule exists; according to the practice of the constitution, the King appoints the Prime Minister, who chooses his colleagues in the Cabinet, recommending each to his particular office. The decisions of the Government on all matters of importance or of general policy are taken in secret meetings of the Cabinet. How far the decisions are arrived at by a majority vote, how far they represent a compromise in which all agree, how far the opinion of the Prime Minister preponderates, are questions which vary from year to year according to the condition of parties, the nature of the problems to be solved, and the personality of the Prime Minister. In general it may be said that the Prime Minister may agree on a particular question to

¹ Aubrey, *op. cit.*, p. 138.

abide by the decision of the majority; no important decision, however, could be taken against his wish without a break-up of the Government. The system is so far collegiate that all the members of the Cabinet, unless they actually resign, are considered equally responsible when once a decision has been arrived at. Foreign constitutional writers have called this the limited collegiate system.

According to the true collegiate system, all questions are referred to the Cabinet; all ministers are equal, decisions are arrived at by a majority vote; the Prime Minister has no special authority. He is only *primus inter pares*.

In Germany before the war, the ministry was organized on what is known as the bureaucratic system. The Chancellor was really the only minister. The Secretaries of State were only high civil servants completely subordinate to the Chancellor. In all questions of doubt the Secretaries of State referred to the Chancellor, who gave his decision, often after considerable delay.

The new constitutions have with one accord rejected this latter method; they have adopted various modifications of the collegiate or limited collegiate system. In most cases they intended to imitate the English form of Cabinet government, but the attempt to define its vague and adjustable principles by fixed constitutional rules was fraught with considerable difficulties.

In Germany, Preuss, in his original draft, deliberately avoided any definition. He gave only the outline of Cabinet government, saying that experience would show how the system would develop best to suit the conditions of German political life.¹ The Chancellor should be responsible for the

¹ *Denkschrift zum Entwurf des allg. Teils der Reichsverfassung*. Reprinted in *Staat, Recht und Freiheit*, p. 389.

general policy of the Government, but every minister should be directly responsible to the Assembly for the administration of his own department. This provision would enable the Assembly to supervise the administration of each department and to cause the removal of a particular minister without bringing about the overthrow of the Government as a whole. The practical result would be that the relations between the Chancellor and the other ministers would be those of a collegiate rather than of a bureaucratic ministry. This end would be achieved without any definite statement to the effect that the Cabinet should be organized on a collegiate basis and decisions taken by a majority vote. The draft was criticized in this respect by a former minister, Delbrück. He mentioned that there was no guarantee that the system would develop in any particular direction desired. Such an important part of the constitution could not be left to chance. It should be clearly stated that the Government must be collegiate. The evils of the bureaucratic system under the Empire had been great. Each minister had carried on independently the work of his own department, and, in case of dispute between two departments, the power of decision had rested with the Chancellor. A dispute was often not settled for months because the Chancellor was unable to deal with all these particular questions:

'If in the future you wish the Government to work smoothly, the first necessity is that the ministry should be organized on the collegiate system . . . thus, all disputes will be settled within the collegiate body in the shortest possible space, in as little as forty-eight hours.'¹

These arguments carried weight. The final draft provides

¹ Session 28 Feb. 1919, Heilfron, p. 959. See also Session 4 July 1919, *ibid.*, p. 3177.

that the National Government shall consist of the 'National Chancellor and the National ministers'.¹ There is a fundamental difference between the Chancellor and the other ministers. The Chancellor is appointed directly by the President; the others on the recommendation of the Chancellor.² The Chancellor determines the general course of policy. The other ministers direct the affairs of their respective departments according to the lines laid down by the Chancellor.³ The Chancellor countersigns all decisions touching the general policy of the Cabinet; any act countersigned only by a minister is considered as purely administrative.⁴ The collegiate character of the Government is secured by the provision that certain questions, the number of which can be increased by ordinary law, can be decided only by the Cabinet as a whole;⁵ these include the drawing up of projects of law, the decision of matters on which ministers disagree, and the issuing of ordinances in so far as this is within the competence of the Government. The decisions of the Cabinet are taken by a majority vote. The Chancellor presides and has a casting vote.⁶

In Poland,⁷ in Latvia,⁸ and in Lithuania,⁹ the President, as in Germany, appoints the Prime Minister directly, and the other ministers on his recommendation. The collegiate character of the Government is more stressed than in Germany. In Poland¹⁰ and in Lithuania¹¹ the Prime Minister presides at Cabinet meetings, but the ministers are jointly responsible for the general policy of the Government, and individually for the administration of their own departments.

¹ Art. 52.² Art. 53.³ Art. 56.⁴ Art. 50, thus interpreted by Brunet, *op. cit.*, p. 174.⁵ Art. 57.⁶ Arts. 55, 58.⁷ Art. 45.⁸ Art. 56.⁹ Arts. 56, 57.¹⁰ Art. 56.¹¹ Art. 59.

The Latvian Constitution provides that the Cabinet as a whole shall discuss 'all Bills drawn up by separate ministries, and all questions concerning the activities of the various ministries, and all questions of State policy put forward by individual members of the Cabinet'.¹

The Lithuanian Constitution contains a rather curious clause according to which 'Ministers who find themselves in a minority when deciding Bills in the Cabinet have the right separately to explain their opinion and its grounds in writing, which is submitted to the Seimas, together with the project proposed by the Cabinet.'² This provision is altogether alien to English conceptions of parliamentary government, according to which all the members of the Cabinet must agree or at least appear to agree on every Government measure, or else resign. Such a statement of difference of opinion as is provided for here would lead to a break-up of the Government. It should be noticed that this clause refers only to Government Bills, not to other decisions of the Cabinet. As has already been said, the control of the Government over legislation is not so perfect on the Continent as in this country. The Assembly does not merely ratify a Government measure; it is expected to amend and to improve—it may even refuse a Bill altogether—without bringing about the resignation of the Government. This being the case, it is obviously an advantage for the Assembly to know the opinion of all the ministers, and their arguments for and against the measure.

In Yugoslavia³ and in Czechoslovakia⁴ the head of the State appoints all the ministers directly. In Czechoslovakia⁵ it is especially stated that the President shall determine which member of the Government shall direct each department. In both cases the Prime Minister, according to the constitu-

¹ Art. 61.² Art. 60.³ Art. 90.⁴ Art. 70.⁵ Art. 72.

tion, has no special authority as against the other members of the Cabinet. In Yugoslavia ¹ the acts of the King must be signed by the competent minister, but the countersignature of the Prime Minister is not required. The most important acts of the Crown, the dissolution of the National Assembly and the promulgation of the laws, must be signed by all the ministers.² Legislative measures can be presented to the Legislative Assembly by individual ministers or by the Council as a whole with the authority of the King. It will be seen that the Yugoslav Constitution leaves to the individual ministers a considerable sphere of independent action. They are directly subordinate to the King, but are not co-ordinated by the will of the Prime Minister, and need not, except in the most important cases, act in a corporate capacity. This seems to show that the King was intended to supply the unifying element in the Government and take a more or less active part in the affairs of State.

In Czechoslovakia, on the other hand, the object of the constitution is to ensure that almost all the affairs of Government be decided by the collective decision of the Cabinet. It is hoped in this way to avoid abuse of power by individual ministers. The sphere of action reserved for the Government as a whole is wide.³ The drawing up of Government Bills, proposals to use the presidential veto, all matters of a political nature, the appointment of State officials and of army officers of the higher classes—all these questions are reserved for decision by the Government in session. The fact that ministers cannot even appoint civil servants on their own authority is looked upon as a protection of the rights of national minorities against abuse of power by an individual minister. The Government is competent to act as a body if, in addition to

¹ Art. 54.

² Art. 52, Art. 80.

³ Art. 81.

the Prime Minister and his deputy, more than half the ministers are present.¹

In Finland, where the President of the Republic plays an active part in the Government, the Council of State is organized on a collegiate basis. The President chooses all the ministers directly;² the Prime Minister is only a president or chairman, who conducts the meetings of the Council when the President of the Republic is not present.³ He has no independent power of decision. 'The business of the Council of State shall be considered in full session, except in cases in which the decision of certain questions has been by ordinance committed to one of the ministers in his capacity as head of a department.'⁴ A quorum of the Council consists of five members. 'Every member of the Council who has participated in the settlement of any matter by the Council is responsible unless his opposition is recorded in the minutes.'⁵

In Estonia⁶ the true collegiate system has been introduced. According to the constitution, all the ministers are appointed directly to their departments by the Assembly. The Prime Minister, who is also the head of the State, unifies the activities of the Republican Government, presides over the meetings of the Government, and is authorized to interpolate any particular minister.⁷

In Prussia and the other German member States, the Diet elects the Prime Minister and he chooses the other members of the Cabinet.⁸

¹ Art. 80 ; see also V. Joachim, *op. cit.*, p. 16.

² Art. 36.

³ Art. 39.

⁴ Art. 40.

⁵ Art. 43.

⁶ Arts. 58, 59.

⁷ Art. 61.

⁸ Constitution of Prussia, Art. 45 ; Constitution of Bavaria, Section 58 ; Constitution of Saxony, Art. 5.

The Control of the Cabinet by the Representative Assembly.

In all these countries, as has been already said, the Cabinet is dependent on the Assembly and must resign on a vote of no confidence. Some rather ineffective attempts have been made to give stability to the Government by protecting it against the attacks of the Assembly. Since in France, where the executive is notoriously unstable, a Cabinet is usually overthrown by a vote following an interpellation, the new constitutions have in a few cases restricted the right of bringing interpellations against the Government.

In Yugoslavia an interpellation,¹ as in France, ends with the vote '*d'un ordre de jour simple ou motivé*'. The number of interpellations, however, is strictly limited by the provision that they are allowed on one day only. In no case may the discussion of an interpellation last more than one session. In Germany² an interpellation must be introduced by at least thirteen members. It does not lead to a discussion unless fifty members demand it; no vote follows unless during the discussion at least thirty members demand such a vote. In Czechoslovakia³ an interpellation must be signed by twenty-one deputies or eleven senators. The minister, as in the case of a question, must answer either in person or by writing, within two months. On the decision of the Chamber a minister may be compelled to answer on a particular day fixed by the Chamber. An interpellation in the Senate, of course, can never bring about the fall of the Government. On the whole, interpellations take up less time and play a less-important part than in France.

In Czechoslovakia⁴ a motion to bring a vote of no con-

¹ Yovanovitch, *op. cit.*, pp. 163, 165.

² Brunet, *op. cit.*, pp. 148-9.

³ Édouard Jolly, *op. cit.*, p. 119.

⁴ Arts. 75, 76, 77.

fidence against the Government must be signed by at least a hundred deputies; it must be referred to a committee, which reports within eight days. For such a vote to be effective it must be carried in the presence of a majority of the legal members. The same applies to a motion for a vote of confidence introduced by the Government. In Prussia¹ a proposal for a vote of no confidence must be signed by thirty deputies. It cannot be voted on until two days after the debate. A vote of no confidence is not effective unless at least half the legal members have voted in its favour. The numbers required to carry such a vote in Prussia are perhaps excessively high. In both cases, the object is to prevent the overthrow of the Government by a chance majority on a sudden vote. In Poland the constitution of 1921 contained no such provision, but according to the amendment of August 1926 a motion demanding the resignation of the Cabinet or of a particular minister cannot be voted upon in the same sitting in which it is proposed.²

These provisions touch only the surface of the problem. Far from giving real strength to the Government, the constitutions have, in Germany and Czechoslovakia, sought to weaken its position by setting up committees of control. The German Constitution provides that committees of investigation can be appointed at any time to inquire into particular questions of importance.³ Such a committee must be appointed on the demand of a fifth of the Reichstag. At the same time, two permanent committees are provided for—the Committee on Foreign Affairs⁴ and the ‘Committee for the protection of the rights of the representative

¹ Aubrey, *op. cit.*, pp. 154–6, Art. 57.

² Amendment of 2 August 1926, Art. 6, which is an addition to Art. 58 of the constitution of 1921.

³ Art. 34.

⁴ Art. 35, par. 1.

body'.¹ Both have the powers of investigation committees. The object of the Committee on Foreign Affairs is to submit the foreign policy of the Cabinet to constant surveillance by the Representative Assembly. It may meet when the Reichstag is not sitting. The object of the other committee is to control the Cabinet when the Reichstag is not in session. It must see that the administration of the country is conducted in accordance with the law and with the will of the Reichstag. The Prussian Constitution provides for a similar committee of control.² In Czechoslovakia³ there is a permanent committee of Parliament, consisting of sixteen deputies and eight senators, that sits during a recess or adjournment. Its powers are wider than those of the German committee, which is conceived only as an organ to control the Cabinet, and not as a representative of Parliament in miniature. The permanent committee in Czechoslovakia has all the powers of the full Parliament, except that it cannot elect the President, vote taxes, declare war, or alter the constitution. The legislation of the committee is valid only with the approval of the President, and must be sanctioned by Parliament at its next meeting.

In practice these provisions are not important. In all these countries the sessions of Parliament are so long and the Government is so weak, that there is little danger that the Cabinet will usurp power and encroach on the legislative functions of Parliament. In fact, the very opposite has been the case. In Poland the ministers under the new constitutions have been so hampered by the interference and criticism of the Assembly, that they have not been able to find time for the creative work of government. The result has been a reaction against the idea that the Cabinet should be

¹ Art. 35, par. 2.

² Art. 26.

³ Art. 54.

continually controlled by the Representative Assembly. The original plan of constitutional revision put forward after the *coup d'état* of 1926 provided that Parliament should meet each year for a single session, which should close four months after the presentation of the budget by the Government. If the budget were not approved within that time, it could be published by the Government as a decree. If the President dissolved Parliament, he could wait four months before ordering new elections. This part of the amendment was rejected, but the fact that such a suggestion was made shows a considerable change in public opinion.

Although not practically important, the clauses of the new constitutions which provide for the continual supervision of the Government are interesting, since they illustrate the motives by which the framers of these constitutions were influenced. The tendency of modern democracy is to set up an organ of government which, in accordance with its composition and mode of election, is calculated to deserve confidence, and then, instead of leaving it to do its work in peace, to hamper it by continual supervision and inquiry. No regard has been paid to what Dicey calls the 'internal limit', to the exercise of power by a constitutional authority.¹ In Germany, for instance, the Reichstag is representative of the people, yet the people, by the initiative and referendum, can exert continual control. The Government is representative of the majority of the Reichstag, yet a committee is established to supervise its actions. In a modern democratic State there is not any real danger that the organs of government will pursue a policy opposed to the wishes of the people. Nevertheless, modern constitutions occupy themselves in devising new means of expressing a popular sovereignty which

¹ Dicey, *Law and Custom of the Constitution*, 7th ed., p. 77.

no one denies, rather than in finding the best method of obtaining the services of able men for the work of government. In so far as the liberty of the subject is in danger in a modern State, this is the result more often of the weakness of the parliamentary government than of any other cause. We shall have occasion to refer to the evil effects of the disorganization of the Government upon the administrative services in many of these countries. In all of them we can trace the tendency, so ably analysed by Dicey, of providing for the liberty of the subject by the introduction into the constitution of all kinds of theoretical rights and then, by means of discretionary powers vested in the Government, taking away with one hand what has been given with the other.¹ A

¹ In Germany the President is invested with the power of 'Reichs-execution', and also with the power of declaring a state of siege. Since the countersignature of the Chancellor is necessary, this is really a power in the hands of the Government. If a member State does not perform the duties imposed upon it by the constitution or by national laws, the President may hold it to the performance thereof by force of arms. 'If public safety and order in the German Commonwealth is seriously disturbed or endangered, the National President may take the necessary measures to restore public safety and order and, if necessary, to intervene by force of arms'. In such cases he may temporarily suspend individual liberties. The President must inform the Reichstag of any measures he has taken under this clause, and these measures must be revoked at the demand of the Reichstag. In the first instance the President, i.e. the Government, alone decides when 'public safety and order is seriously impaired'. During the troubled years following the adoption of the constitution, frequent use was made of these discretionary powers, and parts of the Reich, especially the Ruhr district, were continually in a state of siege. (See Art. 48; also Brunet, *op. cit.*, pp. 164-6.)

In Czechoslovakia the Defence of the Republic Act, passed in March 1923, gave very wide discretionary powers to the Government, and was considered in many quarters as a serious attack upon individual liberties. The terms of the law are vague, giving full latitude to the public prosecutor

democratic Government can be really democratic in its actions only if it is strong and can rely on the loyal support of the nation. By the policy of continual distrust, by setting up one organ against another, the new constitutions are really defeating their own object.

and to the judges to interpret its clauses as they wish. Penalties ranging from imprisonment for eight days to penal servitude for life are imposed for all manner of acts directed against the safety of the Republic, of the President, of the Government, or of the Legislature. Imprisonment may be imposed for 'expressing approval of a crime or misdemeanour', or in certain cases for publishing a photograph of a criminal otherwise than for scientific purposes. A paragraph on the dissemination of false news constitutes a serious interference with the freedom of the press. Rigorous penalties are imposed on any newspaper publishing or quoting news or speeches which might be considered detrimental to the interests of the Republic.

The law gives wide discretionary powers to the executive; the indignation caused by its adoption was to some extent allayed by the fact that the Government made no important immediate use of these powers.

CHAPTER XIV

THE PRACTICAL APPLICATION OF PARLIAMENTARY GOVERNMENT

THE object of this chapter is not to give a consecutive account of the internal history of these States, but only to illustrate from their history the actual working of the political system. It will be found that the complicated rules established in the new constitutions have had little effect on the practical development of Cabinet government. Even where they were intended to do so they have been quite unsuccessful in reproducing the English system.

In England the efficient working of parliamentary government depends on the existence of two large parties. The Government can rely on a majority in the House of Commons; if defeated the opposition is ready to step into its place. The Prime Minister, who is leader of the majority party, can rely on the co-operation in his Cabinet of men who agree with him on essentials and are accustomed and willing to follow his leadership. No less important than the existence of a strong Government majority is the presence of a united, well-organized opposition.

It is obviously impossible that the results should be the same on the Continent, where conditions are entirely different. Owing very largely to the general introduction of proportional representation, political parties are small and many.¹ No one party can hope to obtain a majority, and coalitions, which in England are considered an exception, become the general rule. As a result the formation of the Cabinet in all these countries presents very serious difficul-

¹ See Chapter VII.

ties. Lengthy negotiations take place between the various parties, until a coalition is formed that can command a majority in Parliament. In spite, therefore, of the provisions in the constitutions as to the different methods by which the Governments are to be chosen, they are in fact formed by the party leaders.

It often happens that hostility between the different parties is so great that it is impossible to form a majority. Moreover, post-war conditions in these countries have been so difficult that statesmen have often been reluctant to undertake the responsibility of office and have preferred to remain in a position to criticize. When a majority cannot be obtained a minority Government is formed with the passive support of some other party that does not play an active part in the Government, but undertakes, on certain conditions, not to vote against it. The Cabinet is then at the mercy of these outside parties who do not take any share in responsibility, but are able to put an effective check on the Government. Sometimes the parliamentary system altogether breaks down. Then a solution is found in the appointment of a non-parliamentary government of affairs. The ministerial posts are put into the hands of experts or officials, who are preferably not members of the Representative Assembly, and not closely connected with any political party. The Government has the support of no particular group of parties, but is dependent on the possibility of obtaining a majority for each separate measure introduced.

When after great difficulties a Government has at last been formed, its position is by no means strong. The Cabinet is not homogeneous; its members often differ on fundamental questions. The Prime Minister must abide by the original agreement on which the Government was formed. Every

important measure is discussed in the groups of which the Cabinet is composed before it is presented to Parliament. To prevent strife within the Cabinet the Government programme is often vague and colourless. Moreover, it is often difficult to prevent individual ministers from conducting the administration of their departments in accordance with the principles of their particular party and not with the wish of the Prime Minister. The general result of the coalition system is to emphasize the collegiate character of the Cabinet and to weaken the position of the Prime Minister.

In Germany the constitutional rules concerning the appointment of the Cabinet have had no practical effect on the working of the political system. The President is not free to appoint as Chancellor an outstanding member of the largest party; the Chancellor cannot form his Cabinet by choosing ministers from his own party. Everything depends on the possibility of an agreement being reached by a group of parties strong enough to command a majority in the Reichstag. Prolonged negotiations take place; the party leaders meet and discuss and bargain until it is decided which parties shall take part in the new Government. Even when the basis of the coalition has been agreed upon, the difficulties are by no means at an end. Before the Cabinet can be formed an agreement must be reached as to the programme of the new Government and as to the extent to which each party shall be represented in the Cabinet. The latter point often arouses lively controversy. As a general rule the different parties taking part in the Government are represented in the Cabinet in definite numbers according to their proportional strength in the Reichstag. It is often necessary to create or to suppress ministries so as to provide for a due representation according to proportional strength. If, however, the support

of a particular party is absolutely necessary for the formation of a majority, such a party, even if small in numbers, may be able to obtain the appointment of a larger number of ministers than its size would warrant. The importance of the Centre Party in German politics is due not to its size, but to the fact that it has been found impossible to form a majority either of the left or of the right without the participation of the Centre. Although it has never been the largest party, and usually only takes third place, it has provided the Chancellor to nearly half the ministries that have held office since the adoption of the constitution.

Negotiations often break down at the last moment because difficulties arise as to the distribution of ministries or as to some controversial point in the Chancellor's speech or in the Government programme. After the elections of June 1924 the Nationalists were not included in the new Cabinet because, even when other difficulties had been overcome, it was found impossible to arrive at an agreement with the other parties as to the number of ministries they should hold. The Nationalists were at the time the largest single party, and they demanded the Vice-Chancellorship, the Ministry of the Interior, and the Ministry of Foreign Affairs. These demands were considered excessive. In January 1925 the Bavarian People's Party refused to commit themselves to support the Luther Cabinet, which they had helped to bring into existence, because they were represented in the Cabinet only by one member of their party, the Minister of Posts. This bargaining for places in the Cabinet has the inevitable effect of strengthening the independent position of the ministers. It is difficult for the Chancellor to exercise authority over the other ministers, since he cannot afford to lose the support of the parties they represent. The clause in the constitution

which provides that in case of disagreement between ministers the question should be laid before the Cabinet as a whole, for decision by a majority vote, does not solve the difficulty. In important matters the minority will never submit; the fall of the Government is the result.

Whilst negotiations are being conducted for the formation of a Government, the various parties in the Reichstag meet continually in separate party conclaves to discuss their policy and the terms on which they will consent to work with other groups. The position of the party leaders is by no means enviable. Whilst conducting the most difficult and intricate negotiations they are compelled continually to appear before these party meetings, to justify themselves to their fellow members and persuade them to support alliances with groups whom they may have violently attacked during the election campaign. The leaders of the Centre Party in particular must often find difficulty in justifying their past actions, since the Centre has participated in every Cabinet since the adoption of the constitution.

In these circumstances it is not surprising that ministerial crises are frequent and prolonged. During the first year of the Republic power remained in the hands of the Weimar Coalition, consisting of the Social Democrats, Democrats, and Centre. Although differing on many essential points these parties were joined by their common adherence to the Republican Constitution. Together they had a majority over the Communists and the parties of the right. Nevertheless, the Government was not stable. The greatest difficulty was felt in maintaining the coalition; the Cabinet was three times reorganized under a new Chancellor. In June 1919 the Democrats did not participate in the Bauer Cabinet, since they refused to countenance the signature of the Peace

Treaty. The elections of June 1920 were followed by a prolonged ministerial crisis. The elections had brought a slight increase of numbers to the parties of the right; nevertheless the Nationalists and the People's Party alone were not strong enough to form a ministry, and the Nationalists and Centre were too violently opposed to make possible a coalition of the bourgeois parties. Negotiations took place for nineteen days before the Fehrenbach Ministry was formed, and even then a majority had not been obtained. The Government consisted of a coalition of centre parties (the Centre, People's Party, and Democrats). It could not count on more than two hundred votes in an assembly of four hundred and sixty-six, and could hold office only on sufferance of the Social Democrats.

Four changes of Government took place between the elections of June 1920 and May 1924. The Fehrenbach Ministry was followed by a revival of the Weimar Coalition under Dr. Wirth. The parties of the left had, however, been weakened by the last elections, and this Government, with the support of the Peasants' Unions, had a majority of only four or five. In August 1923 Dr. Stresemann, the leader of the People's Party, took office at the head of a wide coalition of the Social Democrats, Democrats, Centre, and People's Party. This Government had a large majority, but internal dissensions soon broke out. It was impossible to make the Social Democrats and People's Party work together for any length of time. A coalition of the centre, under Dr. Marx, took office until the Reichstag was dissolved in the spring of 1924, as a result of the presentation of the Experts' Report.

The results of the elections did not give a clear answer to the problems by which the country was faced. The majority of the nation had given its voice for the acceptance of the Report. Nevertheless the parties in favour of acceptance were

much divided amongst themselves, and had not command of the two-thirds majority necessary to carry the constitutional amendment by which the Dawes scheme would be put into force. Moreover, the Nationalists had considerably increased their numbers. Together with the various Land Leagues they formed the largest party in the Reichstag. They claimed the right to participate in the Government and even to be entrusted with the formation of a ministry. The President, however, considered it essential to the interests of the country that the continuity of her foreign policy should be preserved. He therefore ignored the claim of Herr Hergt, the Nationalist leader, that he should be commissioned to form a Government. Negotiations continued for several weeks without any agreement being reached. The President summoned each of the party leaders, except the Nationalist, but none of them succeeded in obtaining a majority. Owing to the election results a coalition of the left was not practicable. The People's Party refused to join a Government in which the Nationalists were not included, but no agreement could be reached between the Nationalists and the centre parties on the question of foreign policy. Eventually, after interminable negotiations a minority Government (Centre, People's Party, and Democrats) took office under Dr. Marx. It could command only a hundred and thirty-five out of four hundred and seventy-two votes, and held its position at the discretion of the Social Democrats. Although the elections had brought an increase of numbers to the parties of the right, the Government finally appointed was almost the same as that which had held office before the dissolution. As a certain Democrat rather naïvely put it, the results of the elections had been 'corrected' by the appointment of a Government of the centre.

A similar long-drawn-out crisis followed the dissolution of December 1924. As soon as the results of the elections were known the difficulties that would be experienced in forming a Government became obvious. Neither of the two largest parties, the Nationalists and the Social Democrats, could obtain a majority without joining with some other party with whom they disagreed on at least one essential point. It would be impossible to revive the Weimar Coalition, since the Socialists and the People's Party were now violently opposed. Moreover, the Nationalists had again increased their numbers and claimed the right to form a Government. A coalition of the bourgeois parties did not seem practicable, as the Centre were reluctant to join a coalition with the Nationalists, and they altogether refused to do so unless the Democrats also participated. The Centre were anxious to maintain their position as the deciding factor between the left and right, but the old coalition of the centre parties could not well be revived, since the People's Party and the Democrats had violently attacked each other during the election campaign. Dr. Marx made six unsuccessful attempts to form a Government. When he failed the President summoned the leader of the Nationalists and of the Social Democrats. He was convinced that neither would be able to obtain a majority and therefore fell back upon the idea of a Government of affairs. Eventually, after negotiations lasting for more than a month, a 'bourgeois' coalition was formed on this basis under the leadership of Dr. Luther (Nationalists, People's Party, and Centre). The participation of the Centre was won only on the condition that the new Government was looked upon as a Cabinet of experts. A considerable number of the ministers were not politicians or members of the Reichstag. When drawing up the Government programme, it was only

with the greatest difficulty that a formula was found sufficiently vague to include both the Nationalists and the Centre. Even so the Centre insisted that the Government should ask, not for a direct vote of confidence, but only for the approval of the Reichstag.

Similar difficulties have been experienced in all the countries with which we are here concerned. In Finland a coalition of the centre parties, the Agrarians, and Progressives, under the leadership first of Dr. Vennola and then of M. Kallio, conducted the Government for three years, from 1921 to 1923, although they could rely on the support of only a minority of the Assembly. Dr. Vennola had command of only sixty-eight votes out of two hundred. The parties of the right proved themselves during the first years entirely intractable, and the Government therefore had to bargain for the support of the Socialists. The evil results of minority Governments and of lengthy ministerial crises are in Finland perhaps less acute than in some other States, on account of the more active part played by the President. He has a certain control of the administration; he takes an active part in politics, and gives his advice on matters of importance. After the fall of the Vennola Government in 1922, and again in 1924, when he dissolved the Assembly against the wish of the Government, the President called to office a non-parliamentary Government of affairs, which conducted the administration until a parliamentary Cabinet could be formed. In 1922 the new Diet met on 7 September, but it was not until 13 November that the Kallio ministry was formed. During the interval, the temporary Government did really valuable service.

The President had always encouraged the formation of a bourgeois coalition Government. This was for a long time

impossible owing to the reluctance of the right to take office. In 1924, however, a majority Government at last was formed, consisting of a coalition of the centre and the right, and including representatives even of the less extreme section of the Swedish People's Party (Finnish Coalition, Agrarians, Progressives, Swedish Party). This wide coalition was soon broken down by internal dissensions. The Agrarians opposed the policy of the Finnish Coalition in regard to income-tax regulations and increased expenditure. Although represented in the Cabinet the party voted against a Government Bill. They then instructed the Agrarian ministers to resign and brought about the fall of the Cabinet. The Government was reconstructed without them and a minority Cabinet was formed, consisting of a singularly ill-assorted coalition of the conservatives (Finnish Coalition and Swedes) and the left centre (Progressives). Not long afterwards the Agrarians and Finnish Coalition again came to an agreement. Together they formed a weak minority Government which could command only eighty-two out of two hundred votes. A crisis soon followed, as the coalition parties could not agree on the question of military expenditure. Any other combination, however, seemed impossible. The Progressives, who during recent years had veered more to the left, refused to join a bourgeois coalition. The same parties therefore again took office under different leaders. M. Kallio once more became Prime Minister.

In the Baltic States the difficulties of parliamentary government are no less acute. In Estonia it has been found quite impossible to abide by the clause of the constitution according to which the ministers are elected to their several posts directly by the Representative Assembly. A custom has arisen according to which the Speaker acts as President dur-

ing a ministerial crisis and calls upon some outstanding politician to attempt the formation of a Government. In the meantime the party leaders meet, compromises are arranged, and eventually the Prime Minister presents a completed list of the Cabinet which, since it rests on a previous agreement between the parties, is accepted in its entirety by the Seimas. This arrangement was found necessary since, owing to the confusion of parties and the violent hostility of the various groups, the formation of a Cabinet is a long and difficult process. Unless some authority were ready to take over the affairs of State the country would, after the defeat of a ministry, be entirely without government. After the elections of 1923 the new Seimas met on 7 June. Negotiations continued for two months (until 2 August) before a new Government was formed. It is interesting to notice that the basis of the coalition had not been greatly changed. The outgoing ministry had consisted of the Agrarians and the Labour Party, the new Cabinet contained also representatives of the Democratic bloc (People's Party and Christian Party). In both cases the Government was based on a coalition of the right and centre. The arrangement by which the Speaker presides over the destinies of the State during a period of crisis is by no means a satisfactory one, since he is himself an active politician, who takes part with the other leaders in the game of political intrigue.

In Latvia, when a change of ministry takes place, negotiations habitually continue for a month or more before a decision is reached. There is a good deal of complaint of actual bribery. It is said that the votes of a group or party are won not only by the promise to support measures advocated by them, but also by actual material advantages conferred on individuals. After the elections of October 1922 a complete

deadlock followed. Although every conceivable combination was attempted no Government was formed until 23 January 1923. Then at last a new Cabinet took office, based on a wide coalition of the whole of the centre together with the right wing of the Social Democrats. This Government was necessarily unstable. It had a large majority, but was in continual danger of internal disruption. The Socialists were compelled to justify themselves before their electors. They demanded drastic social reforms, and were soon in open opposition to the Peasants' Union and the Democratic Centre. In May they resigned from the Government and brought about another crisis, which was not settled until the end of June, when a new coalition was formed on the basis of the old, but without the Social Democrats. Three changes of ministry took place before the elections of October 1925. On one occasion, at the time of the Communist rising in December 1924, a minority Cabinet took office which had the direct support of only seventeen members of the Seimas. The President had asked the left Social Democrats, the strongest single party, to form a Government; they refused, and, as it was imperative that some parliamentary ministry should at once take office, the Peasants' Union and Democratic Centre consented to do so. This Cabinet of course could remain in office only so long as it pursued no policy of which the other parties disapproved.

As a result of the elections of 1925 the number of parties returned was even greater than had hitherto been the case, and the political outlook seemed even more confused. The Cabinet resigned, but the President requested them to remain in office until a new ministry could be formed. He also insisted that this must be done before the Christmas recess. He summoned the leaders of all the political parties, not

excluding the minorities, and instructed each in turn to attempt the formation of a Government. They all, after a more or less prolonged effort, declared their inability to do so. The President then summoned the leaders of the two largest parties, the Social Democrats and the Peasants' Union, and impressed upon them the necessity of making further efforts. There followed a unique experience in parliamentary government. After seven weeks of futile negotiations, two Cabinets, one of the right and one of the left, were simultaneously presented to the Seimas, each claiming to have a majority. Both these alternative ministries presented a motion of confidence. The Social Democrats obtained forty-seven votes against forty-four and five abstentions. The combined farmers' parties obtained forty-eight against forty-two and three abstentions. The latter Government therefore took office.¹

Personal antagonism and intrigue play no small part in the politics of these States. It often happens that small parties representing approximately the same classes and interests are most violently opposed. A ministerial crisis may be indefinitely prolonged although no real political issue is at stake. The fact that several parties have joined in one coalition Government does not mean that this hostility ceases. The minister feels himself bound much more by loyalty to his party than to the Government of which he is a member. In Estonia, where the collegiate character of the Cabinet is emphasized in the constitution, this has helped only to strengthen the power of the party organization. The ministers consider themselves bound by the instructions received in the party meetings. They are 'party' ministers, not 'State' ministers. They pursue in their departments the policy advocated by their political groups, and the parties consider themselves

¹ In a vote of confidence abstentions count as negative votes.

justified in recalling 'their' ministers from the Cabinet at any time and replacing them if they think fit by other members of the party, quite irrespective of whether a vote of no confidence has been passed.

In Yugoslavia, Czechoslovakia, and Poland internal dissensions, far more serious than those arising from ordinary political differences, have made impossible the normal functioning of parliamentary institutions. The difficulties of Government have been enormously increased by the fact that considerable sections of the community have taken up a position of permanent opposition, refusing to join the general political life of the nation. The failure of democratic government is due not to the form of the constitution, but to far more deep-rooted political causes.

The evil results of this antagonism within the State have been most acutely felt in Yugoslavia. The problem is the more serious because in that country internal strife does not, as in Poland and Czechoslovakia, arise from the opposition of the National minorities who have been included in the State against their will, but from the bitter hostility of different sections of the Yugoslav people themselves.

Some account has already been given of the problem of centralism and federalism, and of the disputes by which the State was rent at its foundations. To a more or less modified extent the conflict has continued ever since. For four years Yugoslav politics consisted of a long-drawn-out struggle between the Serbian Radicals and the Croat People's Party, a conflict which was emphasized by the violent antagonism of the two outstanding leaders, M. Pasić and M. Radić, by whom these two parties respectively were dominated.

In 1920 M. Pasić took office at the head of a purely Serbian Government of Radicals and Democrats. The Croats, as a

protest against the creation of a centralist State, abstained altogether. They took part in the elections, but their representatives did not attend Parliament. Moreover, as the result of a number of political outrages, the Communist Party had been suppressed and their mandates annulled. The parliamentary opposition, therefore, was reduced to a number of disunited fractions. Nevertheless a stable Government was not ensured. In December 1922 the coalition of Serbian parties broke down. The Democrats resigned, and Pasić took office at the head of a purely Radical Cabinet. The elections of March 1923 did not make the political situation more easy. The Croat Peasants still refused to come to Belgrade, and no party had obtained a majority. M. Pasić resigned. He attempted to form a coalition and failed. He then took office again at the head of a minority Government. In order to obtain a majority he was dependent on the occasional support of Germans and Moslems. He owed his continuance in office to the disunion of his opponents and the abstention of seventy members of the Croat Peasant Party.

Not long afterwards M. Radić decided that the aims of his party were not best secured by the policy of complete abstention. Some of the Croat deputies took the oath and appeared in Parliament; soon others began to send in their mandates for verification. The result was a serious political crisis. If the Croat members came to Parliament in full force the Radicals would represent but a small minority. Nevertheless the opposition was so disunited that any alternative Government seemed impossible. For some time M. Pasić remained in office. As no alternative could be found the King was compelled to sanction his Government, although the methods employed to maintain it were scarcely constitutional. The question of the verification of the Croat mandates was

put to the vote. The motion was lost by six votes. The majority of the Croat party, therefore, were excluded from Parliament by their political opponents. In justification of M. Pasić it must be said that he resigned and repeatedly asked the King to dissolve Parliament. The King refused, as he thought that new elections would not solve the problem or make any substantial difference in the strength of parties, but would only embitter political feeling and even lead to disturbance and bloodshed. In the circumstances M. Pasić was able to remain in office only by proroguing Parliament. He was accused by the opposition of attempting by a *coup d'état* to maintain in office a small body of Radicals against the wish of the majority of Parliament and of the nation.

The King made every effort to bring about a coalition of the opposition parties. At one point a moderate Democrat took office. The Croats did not participate in the Government, but they promised their active support. This attempt to introduce normal parliamentary conditions failed owing to the violence and irresponsibility of M. Radić, the Croat leader. Eventually the King was compelled to recall M. Pasić and to dissolve the Skuptina.

The elections were followed by an extraordinary *volte-face*. The bitter foes, Radicals and Croats, joined in one coalition Cabinet, each throwing over its former allies. The Croats had become convinced of the futility of the policy of intransigent opposition, and it is probable that M. Radić was impressed by the danger of suppression and imprisonment. They therefore gave up their republicanism and declared themselves ready to recognize the monarchy and the constitution. In return, their mandates were ratified and they appeared in Parliament in their full strength. An endless deadlock had seemed probable since neither Radicals nor

Croats had an absolute majority. This deadlock was suddenly overcome by the almost incomprehensible coalition. This coalition was based on a working agreement to the effect that the Croats should give up all revolutionary activities, whilst the Radicals in return should drop the attempt to put into force the centralist form of administration provided for in the constitution. The pact did not prove a success, owing chiefly to the irresponsibility and complete lack of political insight of M. Radić, the Croat leader. The fact that they were members of one coalition Government seemed to him no reason why he should cease his violent attacks on the Radicals.

There seems, however, some possibility that political conditions in Yugoslavia may now become more normal. Even before the death of M. Pasić, a moderate section, opposed to extreme centralism and to the corruption of his immediate followers, had made its appearance within the Radical party. Since the death of M. Pasić it has become increasingly probable that the moderate element within each of the main parties will break away from the extremists, and that these moderates will join together and establish a stable progressive Government.

So far, it must be confessed, no very striking results have been achieved. Throughout 1926 the Radical-Radićist agreement was maintained, although not without frequent breaches, which on each occasion were healed owing partly to the influence of the King, but chiefly to the fact that neither party was in a position to form any other alliance. The bitter duel between Croats and Radicals continued unabated by the fact that they were members of one Government. The indiscretion of M. Radić and the corruption of M. Pasić's immediate entourage gave to both sides frequent

occasions for the most virulent abuse. Throughout the year the Government was seven times reconstructed. The country was, in fact, in a state of chronic political crisis.

In Czechoslovakia the National Minorities and the Slovak People's Party adopted for six years an attitude of intransigent opposition. They sent representatives to Parliament, but persistently refused to participate in the government. Besides this racial antagonism the Government was faced by the opposition of a numerically strong group of Communists. As a result it was impossible to obtain a majority except by the union of all the Czech parties, excluding only the Communist extremists.

In 1920 M. Svehla, the leader of the Agrarians, took office at the head of a Cabinet representing the five main Czech parties—the People's Party, the National Democrats, the Agrarians, the National Socialists, and the Social Democrats. This coalition was maintained until the autumn of 1925. The opposition consisted of Germans, Magyars, Slovaks, and Communists. These were numerically so strong that, although embracing so many shades of opinion, the Government majority consisted originally of only thirty, and of a mere twenty after the desertion of several National Socialists to the Communist Party, and after the elections in Ruthenia, which also strengthened the Communists.

A coalition so comprehensive in character was in continual danger of internal disruption, but owing to the heterogeneous nature of the opposition no alternative Government was possible. Parliamentary institutions became little more than a farce, but at least some measure of stable government was ensured. The coalition could only be maintained by the fact that every Government Bill and every important act of administration was submitted for approval to the leaders of

the parties taking part in the government. It followed that real political power was in the hands not of the Cabinet but of the party organizations. A custom arose according to which the leaders of the five coalition parties met to discuss all important measures before they were presented to the Cabinet. This body of political leaders, quite unrecognized and unforeseen by the constitution, was popularly called the 'Petka' or 'big five'. It held in its hands the substance of political power. The Cabinet became little more than an administrative council, a meeting of heads of departments, bound to carry out the policy approved by the 'Petka'.

Nevertheless, it became increasingly difficult to find a basis of agreement. It was no uncommon thing for parties who were members of the same coalition Government to abuse each other violently in the press. By the autumn of 1925 the situation had become so difficult that it was decided to dissolve Parliament. The weakness of the Government was due not so much to the insignificant size of its majority as to the dissensions that had sprung up between the coalition parties themselves. The National Democrats were in open revolt as a result of the intention of the Minister of Foreign Affairs to recognize the Soviet Union; the People's Party were alarmed at the attacks on the Vatican, and determined never to submit to the separation of Church and State, which was the avowed policy of the centre; the National Socialists were opposed to the reduction of State officials, which was considered necessary for the purpose of balancing the budget, but which would primarily affect the railway employees, the backbone of their party.

The results of the elections did not bring any new solution of the problem. M. Svehla made repeated attempts to bring about a real bloc of the centre by a union of the Czech

Agrarians with the Slovak People's Party, or with one of the German Bohemian parties; but the determination of these racial groups to maintain their independent position made such a solution impossible. The only alternative was to revive the old coalition. The Social Democrats had lost a considerable number of seats to the Communists, and a small majority of eighteen could only be obtained by including in the Cabinet a new party, the Czech Small Traders. The former system of government was continued, with the difference that the 'Petka' became a 'Cheska' or council of six.

This ministry did not last long. In the spring of 1926 M. Svehla forestalled the collapse of the Cabinet by resignation. This resignation was due not to the rejection of the Government policy by the opposition, but to the disruption of the coalition from within. An irremediable conflict had arisen between the bourgeois parties and the Socialists. The Agrarians demanded that a fixed corn and cattle duty should be introduced in place of the elastic tariff actually in force, which provided for a duty on cereals in the event of the world price falling below a certain minimum. The Social Democrats were violently opposed to any increase in the price of food. Since it was impossible to obtain the co-operation of any of the opposition groups it was necessary to fall back on the appointment of a non-parliamentary Government of affairs. M. Cerny, a distinguished official who had presided over a similar Government during the early days of the Republic, became Prime Minister. This Government had no given majority; it was compelled to look for support where it could find it. Its difficulties were aggravated by the fact that the Czech Social Democrats announced their intention of keeping a free hand and offering the strongest resistance to the dictates of the bourgeois parties. The Government

was compelled to rely on the occasional support of the Slovaks and of the less violently nationalist of the German parties.

This proved in fact a means of transition to more normal political conditions. The Slovaks and the left wing and centre of the German parties began to entertain the idea of real participation in the political life of the country. After a few months M. Svehla was able to take office at the head of a parliamentary ministry, consisting of a coalition of the bourgeois parties, a small minority of moderate Germans, the Agrarians, and Christian Democrats, joined with the Czech Agrarians, People's Party, and Small Traders. Later the Slovaks also participated. For the first time a political coalition had taken the place of the old national coalition of Czech parties.

In Poland the condition of parties has been more confused and the Government far more unstable than in Czechoslovakia. Long before the *coup d'état* of Pilsudski, faith in parliamentary government had been shaken by the fact that the country was suffering obvious and irremediable harm from the lack of a strong central authority. Already during the financial crisis in 1923 it had been necessary to fall back on a non-parliamentary Government, which under the leadership of M. Grabski was entrusted with wide discretionary powers.

In Poland, as in the other new States, parliamentary government has developed characteristics hitherto unknown. The most striking feature is the weakness of the Cabinet as a whole and the power of the separate party organizations. In Poland before the *coup d'état* it was taken for granted that the actual nomination of particular ministers should rest, not with the President or the Prime Minister, but with the party

organizations. An agreement was reached between the parties taking part in a coalition Government as to how the various offices were to be distributed. Each party then nominated members to fill the posts allotted to it. In February 1926 a dispute arose between the Socialists and the bourgeois members of the Strynsky Cabinet. The Socialists opposed the financial policy of the Government, and also demanded the return of Pilsudski. When their demands were not complied with, the Minister of Labour, a Socialist, was instructed to resign. 'The Socialists had the intention of withdrawing their ministers altogether from the Government.'¹ Later a new agreement was reached between the the coalition parties. It was announced 'that the Central Committee of the executive of the Socialist Party will at their next meeting appoint their new delegate to the coalition Government'.² In place of M. Moraczewski, the former Minister of Labour, the party executive appointed M. Barlicki, the leader of the party, instructing him to present to the Prime Minister a statement of policy, the acceptance of which was to be the condition of his taking office. The next day it was officially announced that the President of the Republic had, *on the recommendation of the Prime Minister*, appointed M. Barlicki to the post of Minister of Labour. A form of government need not be of old standing before it is modified by constitutional practice. In these States it can be said that the custom of the constitution has grown up before the constitution itself has been fully applied.

In spite of the fact that the object of the constitutions in most of these countries was to imitate the English rather than the French system, and to prevent the Cabinet being subjected to an all-powerful and irresponsible Assembly, it will

¹ *Frankfurter Zeitung*, 12 Feb. 1926.

² *Le Temps*, 9 Feb. 1926.

be seen that in practice the actual working of the system is more similar to that of France than of England. The only difference is that party ties on the whole being stronger than in France, power falls into the hands of the party organizations and not of the Assembly. In either case, the position of the Government is equally weak.

In England also at the present time power belongs to the parties as organized throughout the country, rather than to the House of Commons. The English constitution has been called plebiscitical; the House of Commons takes a second place; at every general election, the nation in returning a party to power chooses the Government that is to remain in office until the next election. The strong position of the Government depends on the fact that under normal circumstances there are only two parties. The Government has behind it the support of a strong, well-organized majority, ready to ratify its decisions in the House of Commons.

These facts were realized by many of those who attempted to imitate the English system abroad. The Democrat Koch,¹ defending the parliamentary system in the German Constituent Assembly, said that one of its chief advantages lay in the fact that the Government, having behind it the support of the Legislative Assembly, was protected from unreasonable attack when in difficult circumstances it was compelled to carry through a policy, unwelcome but made necessary for the welfare of the country by force of circumstances:

‘A modern Government cannot carry through its wishes with any force, unless it has behind it in Parliament a strong and considerable majority which follows closely each development of its policy, and does not leave it in the lurch, if by chance, as a result of external

¹ Session 28 Feb. 1919, Heilfron, p. 970.

circumstances, the situation threatens to become serious. Otherwise it becomes the whipping boy of Parliament instead of its leader.' ¹

The same point of view was put forward by others, who insisted that parliamentary government is of all systems the most democratic, since at a general election the people choose not only the legislative body but also the Government. Nevertheless no attempt was made to bring about the conditions necessary to give concrete expression to this idea.

Bearing this in mind, the futility of trying to reconcile the English form of cabinet government with proportional representation becomes at once apparent. The object of the latter is to create an Assembly which shall be as far as possible an accurate reflection of the various differences and shades of opinion in the country. According to the former, the people at an election are not intended primarily to choose out representatives exactly in agreement with their own opinions; they are asked to make up their minds once and for all which party they will call to office, which leader they will choose as Prime Minister to govern them for the next few years. In both cases a compromise is necessary between those who differ on particular questions but who are more or less agreed on some broad principles of policy. In England such a compromise takes place before the election, when the party leaders draw up their programme, including in it measures that will win the support of different sections of the people; on the Continent there is no agreement until the Assembly has actually met and the Government has to be formed. In England the Government, having won for its programme the direct support of a majority of the nation, is strong; abroad,

¹ Heilfron, p. 970.

being dependent on a compromise between party leaders, each of whom accepts the coalition as a second best only to the rule of his own party, it is weak. The dislike of coalition governments in England is not an unreasoned prejudice. The coalition system is fundamentally opposed to the spirit of the English Constitution.

Further, if the Government is to rest upon the direct choice of the people, it is essential that a change of Government should not take place unless new elections are held. This is a fundamental point that has been very little recognized. In practice the right of dissolution has been but sparingly used. From the brief analysis that has been given of political conditions in these countries it is evident that the Government is frequently changed during the period of a Parliament without any suggestion that a dissolution should follow. Such a change of Government may often mean only a partial reorganization of the Cabinet: one or more parties may withdraw and their places be filled by others; it is probable that the new coalition will include parties that were members of the old, and that a considerable number of ministers will retain their offices. On the other hand, it not infrequently happens that, one coalition having failed, the basis of the Government is entirely changed although the people have not been consulted. This problem cannot, however, be separated from that of the multiplication of parties. Even after a general election the confusion of parties makes it impossible to give direct expression to the popular will. We have quoted at least one instance in which a very marked shifting of numbers from left to right was not in any way reflected in the Government. Usually the results of an election do not give any indication of how the Cabinet is to be constituted. It is essential that the elector should be made to

realize that his function is primarily to choose a Government and not an Assembly. If, by insistence on the rule that the fall of the Government must be followed by a dissolution, the Cabinet were made more directly dependent on the will of the elector, this would inevitably follow.

The new constitutions, in trying to avoid the tyranny of the Legislative Assembly, have given control to the people or to an elected President. They have not realized that the efficient working of parliamentary government in England depends on the fact that the substance of power is in the hands of the Cabinet. If the Government is to be strong, it must command a majority in Parliament and it must have a direct mandate from the people. This direct connexion between the people and the Government is the best guarantee against the tyranny of a Representative Assembly.

The evil effects of the instability of the Government in these countries can scarcely be exaggerated. During the prolonged ministerial crises common to all the States with which we are dealing, the government of the country is held up; all continuity of policy is made impossible; the prestige of the nation is shaken in the eyes of foreign States, and the administration would fall into chaos were it not for the good work done by the permanent officials. In Germany, in particular, where the genius of the nation turns much more naturally to administration than to politics, the old aristocracy of officials, drawn from the best section of the educated and intellectual middle class, has carried the Government through the difficulties of the post-war period. In the other States, however, where there is no such old established officialdom with long traditions of faithful service behind it, not the least of the evils of the disorganization of the Government has been its reaction upon the administration. In

Latvia, Lithuania, and Estonia, bitter complaints are made of supposed party spirit and corruption in the government departments; the number of officials actually under accusation is by no means small. In Yugoslavia and in Poland the continual state of political crisis has made it impossible to organize an efficient government service. Ministers who can never feel sure that they will remain in office for any reasonable length of time have shrunk from undertaking the responsibility of introducing reforms; they have been more interested in political intrigue than in the affairs of their departments. The demand for the reform of the administration and for the 'clean hand in politics' was one of the most powerful weapons used by Pilsudski against the Witos Government. There is considerable danger that the idea of the 'clean hand' will become definitely connected in the public mind with the negation of parliamentary democracy. In Yugoslavia nepotism, corruption, and maladministration vitiated the Government of the Radicals under M. Pasić. In Czechoslovakia the number of unnecessary offices created to win the support of various political parties was at one time so large, that without a stringent reduction in the number of civil servants it would obviously be impossible to balance the budget. Nevertheless, the Act for the Reduction of State Employees¹ was by no means popular; every party agreed with it in principle; each was reluctant to begin the reduction, fearing to lose the support of those of its members

¹ Passed in December 1924. The Act provided for a 10 per cent. reduction in the number of State and municipal employees, to be effected in the course of 1925. It was freely stated that the necessity for this law would never have arisen if effect had been given to a measure passed some three years before, prohibiting any increase in official posts. Since then many new posts had been created for political reasons.

who would be deprived of office. In Poland and in Czechoslovakia, where cases occur of abuses against the rights of national minorities, these are due more often to the independent (often insubordinate) action of particular officials than to the policy of the Government.

As has been already indicated, the failure of parliamentary democracy to produce an efficient government has led to a growing distrust not only of cabinet government but of democracy as a whole. So far these States have not succeeded in making the existing system work satisfactorily or in devising a new form of democratic government more suitable to their political conditions. On the contrary, there is a growing tendency to reject democracy in its entirety. Extra-parliamentary action has already been experienced in Poland and Lithuania. In Finland the reactionary forces are organized in strong military organizations. In all these countries there is a more or less numerous body of so-called Fascisti. There is much vague talk of dictatorship. The idea of the strong man who will appear to save his country in the hour of need has become a kind of political superstition. The example of Italy is frequently quoted, although little attention is paid to the fact that she has not as yet produced a form of government that can be imitated in other countries. There is a not inconsiderable danger, in at least some of these States, that the political faculties of the nation may become moribund; that the most intelligent and energetic section of the people, faced by an apparently hopeless situation, will turn their back on politics; or that, reacting against these conditions, they will make a sudden attempt to overthrow existing institutions, thereby leading to worse confusion, to revolution and civil war.

On the other hand, there is a possibility that some new

form of government may gradually be evolved. The line that such a development will take can best be foreseen by considering the most characteristic features of the constitutional practice of these countries. These undoubtedly consist in the disintegration of parties, the power of the party organizations, the weakness of the Cabinet, and an extension of the political influence of the President. In the light of recent developments in Italy and the interest that the Italian experiment has aroused, the tendency to increase the power of the President would seem the most fruitful of future possibilities.

At first sight the attempts made in some of these constitutions to strengthen the position of the President would seem entirely unsuccessful, since they have not had the effect of producing an efficient form of cabinet government on the English model. On the other hand, the lamentable failure of parliamentary government in many of these countries has been followed by a reaction against the disintegrating forces of political party and an actual increase in the influence of the President. Especially during recent years the head of the State has tended more and more to use his authority to put an end to ministerial crises. Originally the formation of the Cabinet was entirely in the hands of the party leaders. Now, to an ever greater extent, the President has begun to interfere, to insist that a Cabinet must be formed rapidly, to interview the different leaders singly or collectively, removing supposed difficulties and suggesting remedies by which a deadlock may be solved. This is especially true of Germany and of Finland. In Latvia, where the position of the President according to the constitution is not strong, he has nevertheless exerted his authority—at present only a moral authority—to impress upon the party

leaders the necessity for combined action. In Poland, even before the *coup d'état* of Pilsudski, the President was beginning to take a more active part in politics, and, although this was not foreseen by the constitution, he made a practice of being present at Cabinet meetings.

Bearing in mind this natural development, it will not perhaps seem far-fetched to suggest that in the future some new form of government may be devised which will satisfy the need for a strong executive and yet not run counter to the desire for the representation of separate interests or imply, as in Italy, the rejection of the fundamental principles of Democracy.

PART VI

THE SOCIAL FUNCTIONS OF THE STATE

CHAPTER XV

THE SOCIAL AND ECONOMIC DUTIES OF
GOVERNMENT

THE most characteristic feature of the new constitutions is the recognition of the fact that one of the chief functions of the State must be to secure the social well-being of the citizens and the industrial prosperity of the nation. Industry must be organized as a collective whole for the good of the community and not of the individual. According to the German Constitution, 'The organization of economic life must conform to the principles of justice, to the end that all may be guaranteed a decent standard of living'.¹ The Estonian Constitution contains a clause to the effect that 'the economic organization must correspond with the principles of justice, the object of which is to secure conditions of living worthy of human beings'.² The minister David in the German Constituent Assembly declared that it was one of the first duties of Government 'to make ample provision for securing to every honest worker in every German land an adequate means of decent and self-respecting existence'.³

¹ Art. 151.

² Art. 25. This clause is not so strongly worded as that in the provisional constitution, which declared that 'In the Estonian Republic all citizens are secured the rights of a standard of living worthy of human beings'.

³ Heilfron, p. 1240.

Labour is recognized as the most valuable asset in the achievement of this end. Therefore capacity for work of any kind is singled out for special protection by the State. According to the German Constitution, 'Labour shall be under the special protection of the Reich'.¹ The Reich shall adopt a uniform labour code. A special provision is included to the effect that intellectual and manual labour shall enjoy the same rights and privileges. For the protection of labour the State must establish a comprehensive scheme of insurance 'for the conservation of health and of the capacity to work, for the protection of maternity, and for the amelioration of the economic consequences of old age, infirmity, and the changing circumstances of life'.²

Similar clauses may be found in most of the other new constitutions. The preamble to the Polish Constitution declares that one of the objects of the State is to secure 'due rights and the special protection of the State to labour'. Although in the fundamental law of Finland there is no separate section devoted to economic questions, a special clause is introduced among the rights of Finnish citizens to the effect that 'The labour power of citizens shall be under the special protection of the State'.³ Although it is the function of the Government to watch over the interests of labour, labouring citizens of all classes and professions are to be in a position to protect themselves, to improve their own economic conditions. No attempt is made to preserve the isolation of the individual citizen. Every encouragement is given to the formation of professional associations. According to the German Constitution freedom of association is guaranteed 'to every one and to all professions . . . for the defence and amelioration of conditions of labour and of economic life'.⁴

¹ Art. 157.² Art. 161.³ Art. 6.⁴ Art. 159.

The Estonian Constitution, apart from the recognition of the general right of association, contains a clause giving special protection to the right to strike.¹

In order to further the efficiency and capacity to work of the nation the constitutions of Yugoslavia, Germany, and Finland² contain special provisions that technical schools must be established for the training of the citizens in various vocations, and aid must if necessary be given by the State to make possible the attendance of capable children of poor parents at such schools. 'The Government will endeavour to create for its citizens equal opportunity to prepare themselves for profitable vocations to which they are inclined. In that direction it will establish educational trade organizations and provide for permanent assistance for education of worthy poor children.'³

According to the German Constitution every citizen is under an obligation to 'use his intellectual and physical capacity as may be demanded by the general welfare'.⁴ Since the duty to work is imposed by the State, this is supposed to entail an obligation on the part of the Government to find work for the individual, and to provide for him if the opportunity for work is not forthcoming. In Germany the Government is expected to provide for the maintenance of every citizen, not only when it is impossible for him to find work of any kind, but 'in so far as a suitable occupation cannot be found for him'. This implies the momentous consideration that the State is expected not only to support the destitute, but to provide for the whole population what they may consider suitable education and occupation.

It is impossible for the State to provide for the economic

¹ Art. 18.

³ Yugoslav Constitution, Art. 22.

² Arts. 78, 79, 81.

⁴ Art. 163.

welfare of the community as a whole unless it is empowered, if necessary, to restrict the economic freedom of the individual. 'The Government has, in the interest of the whole and based upon the spirit of the law, the right and duty to intervene in the economic affairs of its citizens in the spirit of justice and for the prevention of the social adversity.'¹ Nothing could be more in contrast with the Liberal point of view, according to which the economic relations of individuals with each other are no concern of the State. The economic freedom of the individual is no longer considered as a self-understood right; such freedom exists only in so far as by means of it a social function is performed; it is limited by the interests of the industrial life of the nation as a whole. Therefore, although the freedom of the individual is recognized in certain spheres and is protected by the constitutions, this freedom is at the same time severely curtailed for the benefit of the community. An attempt has been made to conciliate the rights of the individual with the interests of the collectivity.

The right of private property is recognized, but it is by no means absolute. According to the German Constitution, 'Property shall be guaranteed, its nature and limits shall be fixed by law.' 'Property imposes obligations. Its use by the owner shall at the same time serve the public good.'² The ownership of landed property entails the duty towards the community of adequate cultivation. 'An increase in the value of land which accrues without application of labour or capital shall inure to the benefit of all.'³ According to the Yugoslav Constitution, 'Property is guaranteed. Property creates responsibilities. The use of property must not

¹ Yugoslav Constitution, Art. 26.

² Art. 153.

³ Art. 155.

interfere with the interests of the community. The amount, extent, and limits of private property are fixed by law.’¹

The possibility of expropriation or forced sale against the wish of the owner is recognized, but such expropriation is possible only in accordance with the law. In Germany the general intention seems to be that compensation shall be paid, but the possibility is admitted of confiscation for the public good without compensation. The constitution does not give any definite answer to the question. ‘Expropriation . . . shall be accompanied by just compensation unless otherwise provided by law.’² This clause is the result of a compromise between the demands of the Socialists, who wanted to exclude the question of compensation altogether from the constitution, and the bourgeois parties, who insisted that expropriation should never be allowed to take place without compensation.

Landed property can be expropriated, apparently without compensation, if its acquisition ‘is necessary for the satisfaction of the demand for dwellings’, ‘for the promotion of colonization and reclamation, or for the improvement of agriculture’. The State has the right to control the distribution and use of the soil. The object of such distribution shall be to secure ‘to every German citizen a healthy and adequate habitation; special consideration shall be paid to the needs of discharged soldiers’.³

The German Constitution contains a special clause dealing with the socialization of industry. At the time of the revolution the extreme Socialists had demanded the immediate socialization of all industries. The workers themselves were to take over the ownership and management of each concern. The Majority Socialists, however, soon began to realize the

¹ Art. 37.

² Art. 153, par. 2.

³ Art. 155.

difficulties and dangers of such a measure of complete socialization. They insisted that at all costs experiments must be avoided that might lead to a diminution of output.

Nevertheless various schemes were put forward. In November 1918 a committee had been appointed to investigate the question in detail. The committee adopted the attitude that the transference of industry from private to public or communal ownership must take place gradually; individual industries should be taken over as they became 'ripe' for socialization.

In the meanwhile an entirely different point of view had been taken up by the Ministry of Economic Affairs. The heads of the department, Wissell and Möllendorf, had prepared an elaborate scheme according to which the whole of German industry was to be organized on a systematic plan.¹ Co-operation should take the place of competition. Hitherto the promoters of industry had been working in the dark. In the future all unnecessary waste and duplication should be avoided; the knowledge and experience acquired in any one undertaking should be put at the disposal of others. A single purpose should direct the economic life of the nation. 'The reconstruction of Germany's economic life will be possible only on the condition that the interests of the community are given precedence over those of the individual, and that all sections of the producing community, employers and employed, industry and agriculture, are brought together to work in unison for the common good of all.'²

To achieve this end each industry was to be organized as a self-governing body administered by representatives of the

. ¹ *Gemeinwirtschaft, Planwirtschaft.*

² Wissell's letter of resignation to the Cabinet quoted in Finer, *op. cit.*, p. 103.

employers and workers, to whom were to be added representatives of commerce and of the consumers. These vocational associations would send representatives to a central body, the Federal Economic Council, which, in conjunction with the Ministry of Economic Affairs, would be ultimately responsible for the conduct of the economic life of the nation.

The scheme was rejected by the majority of the Social Democratic Party and by the Government, who did not consider themselves in a position to introduce such far-reaching changes. It was violently opposed by the extreme Socialists, who would be content with nothing short of the complete abolition of the employing class. The Wissell scheme is, however, interesting, since it had considerable influence on those who afterwards drew up the economic clauses of the constitution.

As a result of the strikes in March 1919 two laws were hastily passed by the National Assembly, providing for the socialization of the coal and potash industries. At the same time the Government promised to introduce into the constitution a general measure for further socialization.

The constitution as finally adopted does not prescribe the immediate confiscation by the State of industrial undertakings, but it provides for the possibility of future socialization. Such socialization may take the form either of State Socialism or of a system of collective economy similar to that which had been suggested by Wissell and Möllendorf for the organization of each separate industry, and which had in its main outlines been applied to the coal and potash industries. The State may,¹ without prejudicing the right of compensation, take over and transfer to public ownership private enterprises fit for socialization. It may keep such enterprises

¹ Art. 156.

in its own hands and conduct them by means of its civil servants; or it may participate only in part in the ownership and administration of a business; or it may cause the States or municipalities to share in the management of economic enterprises, 'or in any other manner assure to itself a determining influence therein'. Further, without taking over the management into its own hands, the Government may constrain enterprises belonging to one industry or to similar industries to combine. Thus united, the enterprises are to be administered by organs in which shall be represented all the 'human elements that take part in production'. Employers and employees shall co-operate in the management of the business. A business thus organized would form 'an autonomous body' (*Selbstverwaltungskörper*). Such an autonomous body would, it may be supposed, be similar to a public corporation. It would administer its own affairs under the supervision of the State, but would have to comply with the provision that all who share in the work of production also share in the work of administration, and that production and distribution are conducted to serve the interests of the community. It should be noticed that the constitution by no means imposes the necessity for socialization of any kind; it only recognizes the possibility, and lays down various rules in accordance with which such socialization should take place. The last method suggested is particularly interesting, since it takes into account the demand of the workers that they should be given an active share in the organization of the business on which they are engaged.

The other new constitutions do not contain any special provisions referring to the socialization of industry. Various limitations are, however, put upon the right of private property. In Yugoslavia, a primarily agrarian country, such

limitation refers only to landed property. It was considered necessary for the welfare of the community to abolish the large landed estates; property in regard to industry was not limited because no large industrial concerns existed. According to the constitution a special law is to fix the maximum extent of any one hereditary estate and the minimum which cannot be alienated from the owner.¹ The surplus is to be expropriated and divided amongst those who do not own land. When the division is made preference is to be given to soldiers who have fought for their country. In most cases expropriation is to be accompanied by an indemnity fixed by law. This indemnity is not to be equivalent to the value of the property, but is to be regulated by social equity. For large estates which belong to members of the former alien dynasty, and those which the foreign Powers have granted to individuals, no compensation is to be given. 'Large private forest tracts are expropriated according to law . . . and become the property of the State or its self-governing bodies.'² The discussion of this clause in the Assembly made it clear that all forests, even those belonging to convents, monasteries, villages, and autonomous bodies, were to become the property of the State. This expropriation, however, need not be entirely carried out in practice; the law can decide to what extent forests are to remain the property of public autonomous bodies.³ The expropriated forests are to be maintained for the profit of the State. A law is to decide how far the agricultural population may use forests for gathering wood or for other purposes. All remnants of the feudal system are abolished.⁴

The Polish Constitution gives more real protection to the

¹ Art. 43.

² Art. 41.

³ Yovanovitch, *op. cit.*, pp. 327-9.

⁴ Art. 38.

right of private property than does that of Germany or of Yugoslavia. The possibility of expropriation and forced sale is admitted, but compensation must in all cases be paid.¹

In the Czechoslovak Constitution, although there is no special economic section, there is a clause to the effect that 'Expropriation is possible only on the basis of law. Compensation shall be given in all cases unless it is or shall be provided by law that no compensation be given.'² It is interesting to contrast this clause with that of the Belgian Constitution of 1831, which provides that 'No one may be deprived of his property except for a public purpose and according to the forms established by law and in consideration of a just compensation previously determined'.³

The new constitutions of the Baltic States do not contain any detailed provisions dealing with economic matters. The question of agrarian reform was, however, one of the most vital problems with which the new States were faced. The constituent assemblies were compelled to give their attention to the question before they could proceed with the work of drafting a permanent constitution. In Estonia,⁴ Latvia, and Lithuania, agrarian laws were passed, which recognize the right of the State to confiscate private property, to administer it for the benefit of the community, or to divide it amongst individuals. In Estonia it was estimated that 75 per cent. of the people were landless. The country was thinly populated; large estates were in the hands of the 'Baltic Barons' of German extraction. The Government was not slow to realize that the people would not fight against the Bolsheviks in order to keep the land in the hands of German landlords. It was feared that unless the State took immediate action the

¹ Art. 99.

² Art. 109.

³ Art. 11.

⁴ Ernest Fromme, *The Republic of Estonia and Private Property*.

land might be seized as in Russia. During the year 1919 a comprehensive scheme of agrarian reform was carried through. All estate lands are considered as having passed from private ownership into the hands of the State. Expropriation is to be accomplished gradually. Compensation is to be paid for stock, according to the full market price, and for land according to an assessment fixed by law on the basis of the latest taxation assessments. The land confiscated is to be granted to individual cultivators, with hereditary tenure in small holdings within the working capacity of one family and two horses. The land grantors are to be the local, communal, and district councils under the control of the Government. Neglected or uncultivated land is to be first taken over, and then that of German landholders who supported German colonization or fought with von der Goltz. In Latvia¹ and Lithuania² similar agrarian reforms have been carried through.

The confiscation and division of the large estates in Eastern European countries can be justified on principle only by the acceptance of a definitely socialistic conception of the nature of property: no individual has any inherent or absolute right to the possession of private property; the distribution of property in the State must conform to the general interests of the community. Nevertheless the actual result of the reform has been greatly to increase the number of citizens who are directly interested in the maintenance of private property. The land has been redistributed, but it has not been taken over for cultivation by the State or by collective associations. Wherever an attempt was made

¹ See text of agrarian law published in *La République de Lettone*, édité par le Bureau Letton d'Information à Paris.

² *A Brief Historical Sketch of Lithuania*.

to preserve the large estates and to cultivate them on a communal system¹ the result was a lamentable failure. From an agricultural point of view the division of the large estates into small holdings which are handed over to peasants, who are often ignorant and unenterprising, may be far from satisfactory. Politically, the result has been to strengthen the position of the new State and also to bring a considerable access of power to the anti-Socialist forces. A large class of peasant proprietors has been created, who are equally interested in the maintenance of the new State and of the rights of private property.

The right of inheritance is recognized by the new constitutions, but is limited by the right of the State to levy death-duties. The German and Yugoslav constitutions contain special provisions stating that 'the share of the State in hereditary estates shall be fixed by law'.²

Freedom in the choice of occupations, freedom of commerce and industry, freedom in economic transactions, and freedom of contract is guaranteed within the limits already described. According to the Yugoslav Constitution, 'freedom of negotiation and organization in business affairs is recognized in so far as it does not interfere with social interests'.³ The object of this clause is to prevent the exploitation of the consumer by trusts and cartels, and especially to prevent any artificial raising of the price of necessities.

The practical results of these economic provisions have not been important. Hardly any steps have been taken to bring about the socialization of industry. Especially in Germany there has undoubtedly been a movement towards the organ-

¹ e. g. this was done by the Karoly Government in Hungary.

² Yugoslav Constitution, Art. 39; German Constitution, Art. 154.

³ Art. 25. Yovanovitch, *op. cit.*, p. 335.

ization of industry on a more scientific basis, towards co-operation between kindred industries and the union of small firms with big undertakings. This has, however, been accomplished almost entirely by private enterprise. The trust movement has been much extended. In these modern trusts the workers are well organized; they are often in a position to impose their own terms; they are consulted in regard to the conditions of labour, and the owners have to a great extent adopted the policy of co-operating with their men and winning their support at the expense of the consumer. Nevertheless, the fundamental problems of socialization have not been touched upon. Ownership and management both remain in the hands of the capitalist. Where the State has interfered to bring about socialization, as in the coal and potash industries, the result has not been an unqualified success. State Socialism has been discredited. Recently an attempt has been made to organize these 'socialized' industries to an ever greater extent on the model of private companies. Taking industry as a whole, the capitalist owner, far from losing control, has during the post-war period gained enormously in wealth and importance.¹

Many of the clauses that have been dealt with in this chapter are quite without legal force; for instance, that which in Germany prescribes the moral duty of every citizen to work for the good of the community. Others lay down general principles for the future guidance of the Government. There is no means of compelling the Government to carry out these provisions. They are in fact mere statements of policy. Their inclusion in the constitutions is of importance only as indicating the general trend of public opinion at the

¹ Price, *Germany in Transition*; Arthur Shadwell, *The Breakdown of Socialism*.

time of their adoption. It is interesting to contrast them with the corresponding provisions of earlier constitutions, the sole object of which is to secure the rights of the individual and to protect him from excessive interference on the part of the Government. Although the form of the new constitutions is in the main liberal and democratic, the spirit that animates them is often socialistic. The contending influences of Socialism and Individualism can be traced not only in the constitutions as a whole, but in separate sections, even in separate clauses.¹

¹ e.g. German Constitution, Art. 153: 'The right of private property is guaranteed by the constitution. Its nature and limits are defined by law.' Art. 157: 'Labour is under the special protection of the commonwealth.' Art. 164: 'The independent agricultural, industrial, and commercial middle class shall be fostered by legislation and administration.'

CHAPTER XVI

AN ECONOMIC CONSTITUTION

IN Germany it was in many quarters considered impossible for the State to fulfil the economic and social functions that have been enumerated in the last chapter, unless some special organ could be established in the constitution by means of which adequate expression could be given to the needs of industry. In the words of Stresemann, 'a mighty economic life strives in this country for influence. On the one side are the social demands and problems of the worker; on the other side the needs of the middle-class population; on the third, all the anxieties for the future of commerce and industry and the problems of agriculture.'¹

After much discussion and controversy a clause was finally introduced into the constitution providing for the establishment of a National Economic Council based on an elaborate substructure of Workers' Councils and District Economic Councils. The object of the District Economic Councils and of the National Economic Council is to represent the interests of all important vocational groups 'in proportion to their economic and social importance'. Each vocation is to be represented by both employers and workers, and to these shall be added 'other interested classes of the population'.

In the dark days of 1918, when the old institutions of State had been overthrown by the revolution and the Government was weak and paralysed, it was thought that industry could be saved only by self-help, by organizing itself and administering its own affairs independently of the State.²

¹ Heilfron, p. 1230.

² Tartarin-Tarnheyden, *op. cit.*, p. 149.

The *Arbeitsgemeinschaften*, or Industrial Alliances of employers and workers, were to form the substructure for an autonomous industrial organization. Sinzheimer, afterwards Minister of Economic Affairs, was particularly in favour of a policy of 'liberating industry from politics, emancipating the industrial organism . . . of establishing an industrial constitution side by side with the constitution of the State'.¹

When the State was once more in a position to assert its authority, to supervise and control, it made use of the organizations that had been evolved by industry on its own behalf and incorporated them in the political constitution.

The German economic constitution recognizes that in industry there are two contending forces arising from a community and from an antagonism of interests.² There is an antagonism between the interests of labour and capital, and at the same time a community arising from the interest of both in the work of production.

The interests of labour are secured by the establishment of Workers' Councils in every industrial undertaking. These Workers' Councils are provided for in the constitution and have since been established by law. Committees of workers had already been introduced in factories before the war, but their activities were limited to various forms of welfare work. During and after the war their powers were increased, and in some cases joint arbitration committees were established by means of which conflicts between employers and employees could be decided.³ The *Betriebsräte Gesetz*⁴ makes the establishment of Workers' Councils compulsory. Apart from merely social questions their powers are limited by the

¹ Tartarin-Tarnheyden, *op. cit.*

² Sinzheimer, Reporter to National Assembly, Heilfron, p. 4263.

³ Brunet, *op. cit.*, p. 238. ⁴ See text published in Heilfron, vol. ix.

rights of the Trade Unions. The Trade Unions were at first strongly opposed to the establishment of the Councils; they would support them only on condition that the regulation of hours and conditions of labour should remain the function of the Trade Unions. The Workers' Councils should concern themselves only with carrying out the agreement arrived at between the Trade Unions and the employers. Two movements were at work amongst the working-classes: the one sought to continue according to the old lines and to improve the conditions of the worker by means of collective bargaining; the other to introduce an entirely new order, and by means of the Councils to win for labour a preponderant share in the conduct of industry. The novelty of the *Betriebsräte Gesetz* depends on the clauses which provide that representatives of the Workers' Councils shall be admitted on the board of directors, that they shall have the right to suggest new processes and methods of work, that they be allowed to co-operate in the appointment of workers and to examine the balance-sheets of the firm.¹ In spite of these provisions the law was attacked as not fulfilling the clause of the constitution according to which 'wage-earners and salaried employees are qualified to co-operate on equal terms with the employers . . . in the entire economic development of the productive forces'.²

According to the constitution further Councils of Workers are to be organized in 'each economic area, and these are to be joined in a National Workers' Council for the whole Reich'.³ These wider Councils have not as yet been established.

¹ See discussion of the law in the National Assembly, Heilfron, vol. ix, pp. 5 et seq.

² Art. 156, par. 2.

³ Art. 156.

In order to foster the common interest of production 'the District Workers' Councils meet together with representatives of the employers and other interested classes in the District Economic Council and in a National Economic Council'.¹

The function of the National Economic Council is to give expression to the needs of industry and to act as an advisory body to the political Parliament, which has the ultimate power of decision in all cases. According to the constitution the draft of every important law on social and economic questions must before introduction in the Reichstag be submitted by the Cabinet for consideration to the Economic Council. The Government need not accept the opinion of the Council, but it must always consider it. Even if the opinion of the Council is not accepted by the Government, it must be put before the Reichstag. The Council has itself the right to initiate social or economic measures; these are introduced in the Reichstag through the medium of the Cabinet, but the Cabinet must introduce them whether it approves of them or not, and the actual presentation of the Bill may be made by a member of the Economic Council.

The whole hierarchy of Councils provided for by the constitution has not as yet been established. In the meantime a 'Provisional Economic Council' has been called into being. Its functions and composition are similar to those of the National Economic Council provided for in the constitution, but it does not enjoy the right of legislative initiative; it cannot insist on putting its views directly before the Reichstag and can therefore exert influence only in so far as it can make an impression on the Government.

Great difficulty was experienced in reaching a decision as

¹ Art. 156.

to the composition of this Council.¹ The Government, who in this matter had the support of the Industrial Alliances, insisted that the Council must be organized on the basis of parity between employers and workers. This was the undoubted intention of the constitution in regard to the National Economic Council. Each industry must be represented by an equal number of employers and workers. In the main this principle was adhered to. Certain exceptions were made in regard to agriculture, handicrafts, and small traders. It was pointed out, during the discussion of the Government project in the Reichsrat, that in Germany fully two-thirds of those engaged in agriculture are small independent farmers or peasant proprietors, who neither employ labour nor work for hire. In opposition to the industrial workers, who thought that they would swell the ranks of the 'bourgeois classes', these small farmers obtained special representation. A further controversy arose in regard to the representation of consumers. The constitution states that in the Economic Council representation shall be given to workers, employers, and other 'interested classes'. According to the Government interpretation this meant consumers, officials, and members of the liberal professions. This point of view was opposed by the Industrial Alliances, who argued that in an assembly containing members of all industrial, agricultural, and commercial occupations, there was no possibility that consumers would not be amply represented. Producers in one industry would be consumers in another. The Government, however, were afraid that unless the consumers were adequately represented, the employers and workers

¹ For the composition and work of the Provisional Economic Council, see *Finer, op. cit.*, Chaps. V and VI, and Tartarin-Tarnheyden, pp. 165 et seq.

might come to an agreement at the expense of other classes of the community. They also thought it advisable to introduce members of the liberal professions who, it was thought, would make valuable contributions to the work of the Council, and by the very fact that they would take an objective point of view would break down the crude antagonism of classes which might be the result of a completely logical application of the parity principle.

A great deal of discussion took place as to how far the representatives should be chosen on a purely vocational and how far on a territorial basis. The constitution had envisaged a combination of the two systems. The whole Reich should be divided into 'economic districts'; each district should have its own Council, chosen on a vocational basis, and these District Councils would send representatives to the Central Economic Council. In the Provisional Economic Council the vocational principle, supported by the Industrial Alliances, in opposition to the Reichsrat and State Governments, was on the whole triumphant. The bulk of the representatives of agriculture and industry are chosen by central vocational associations or by the Industrial Alliances. The centralist tendency is further augmented by the fact that the District Workers' Councils have not yet been established. The representatives of the industrial workers are appointed by the Trade Unions. Some concessions were made to the territorial principle. A small section of the representatives of industry and agriculture are chosen on a territorial basis; the representatives of commerce, transport, and municipal enterprises will naturally to a certain extent represent local interests; and, moreover, a special group, to be appointed by the Reichsrat, has been established for this express purpose.

Even when these questions had been settled, the difficul-

ties were not at an end. Violent conflicts arose as to the number of representatives to be given to each interest. Composition according to the numerical strength of each vocation would obviously be contrary to the whole intention of the Council, which was to take into account, not numbers, but economic value. It was, however, no easy task to decide the comparative economic importance of various vocations. As soon as the first scheme was drawn up, the Government, the Reichstag, and the Reichsrat were besieged by petitions from groups or professions who claimed that they were inadequately represented or not represented at all. At first the difficulty was shelved by increasing the numbers of the Council when any particular interest clamoured importunately for further representation. Originally it had been intended to create a Council of a hundred members, but it soon became clear that in so small a body sufficient subdivision would not be possible; many separate interests would inevitably be altogether excluded. Eventually the numbers were raised to two hundred, and finally to three hundred and twenty-six. The Government then determined that no further increase should take place.

The Council as finally established contains ten groups. The first six represent agriculture, industry, commerce, transport, and handicrafts. With the exception of a few members of the groups of agriculture and handicrafts, the parity principle is strictly observed. The other groups consist of consumers,¹ officials, members of the liberal professions, and Reichsrat and Government nominees. Within the Council there are horizontal as well as vertical divisions. It was hoped to establish a body in which one vocation would

¹ Representatives of co-operative associations, housewives, and domestic servants.

balance another, but in which at the same time approximate equality would be observed between employers, workers, and the 'other interested classes'. It will, however, be seen that this Council is not so much an assembly reflecting the nation in its vocational capacity as a 'Council of Production'. In this respect it does not fulfil the desires of Conservative statesmen who had advocated the representation of the whole nation according to *Berufstände*. The bulk of the representatives are chosen from the productive classes, from agriculture, industry, and commerce. Officials, doctors, lawyers, teachers, and university professors are certainly not represented in accordance with their social importance. The liberal professions are included not so much on their own account, but because it was thought they might give valuable advice on economic questions.

The technical nature of the Council is emphasized by its method of procedure. The bulk of the work is done in committees. There are three permanent committees;¹ the others are constituted *ad hoc*. In this way it is possible to obtain the detailed discussion of a measure by a small body of experts. If necessary outside advice can be taken. In these committees the workers and employers must always be equally represented, and each committee must contain a certain number of representatives of the consumers and Government nominees. Every project sent to the Council is immediately put before the appropriate committee. After a decision has been reached in the committee, the question is laid before the whole Council. In cases of urgency a committee can, with

¹ Committees on Social Political and on Economic Political questions and a Committee to draw up a constitution for the National Economic Council and the District Economic Councils. There are many sub-committees.

the consent of the bureau of the Council, communicate its decision to the Government before it is discussed by the Council as a whole.

In the Council voting takes place by head and also by group. Mere majority voting would obviously be useless in a body the object of which is to give expression to the considered opinion of the various vocations. A minority of the Council exceeding one-fifth of the total membership, or any group that has been outvoted, can demand that its attitude be put before the Government together with the majority decision. Moreover, a minority outvoted within a group, if it amounts to one-third of the total membership of the group, may lay its opinion separately before the Government.

The function of the Council is not to make decisions, but to supply the Government and the Reichstag with expert advice. The value of such advice must to a certain extent depend upon the time at which it is proffered. From this point of view it is a great drawback that the Government does not consult the Council until a project has been finally drafted by the department concerned and accepted by the Cabinet. At this point the Government are naturally reluctant to make alterations and anxious to get the measure put into force as quickly as possible. Moreover, there is considerable danger that the departments when drawing up particular measures will consult their own experts and ignore the existence of the Council. If this were consistently done, the Council would lose its chief *raison d'être*.

In several other countries an attempt has been made to imitate the German experiment. The Czechoslovak Constitution contains no provision for the establishment of an Economic Council, but an Advisory Council for Economic Affairs has been established by Government decree. This

has been done in accordance with the provision of the constitution which gives to the executive the right 'to establish and organize State organizations exclusively concerned with administration in economic matters and not having governmental authority'.¹ This Council is of course a purely advisory body and has no independent powers.

The original Council² established in November 1919 was appointed entirely by the Government. This body was not a success. The Government, for political reasons, was often compelled to ignore its advice and to come to decisions without paying proper regard to purely economic considerations. Moreover, the working-classes, who through their political organizations played an important part in the Diet and in the Government, distrusted the Council, on which they were not adequately represented. In December 1921 the Council was fundamentally reorganized. The new body consists of a hundred and fifty members. Sixty are nominated by the employing class through the medium of vocational associations, such as the Agricultural Council, the Central Association of Czechoslovak Industrials, the Association of Czechoslovak Banks, the Trade Council, and the Chambers of Commerce. Sixty are representatives of the workmen and employees nominated by the various Trade Unions. Thirty are specialists in Economic Science, consumers, and 'men of independent occupation' appointed directly by the Government.

The bulk of the work of the Council is done in permanent committees. In cases of urgency these committees are entitled to give expert advice without the sanction of the Council as a whole. If the Cabinet or any Government department

¹ Art. 90.

² This account of the Advisory Council on Economic Affairs is based on information supplied by the Czechoslovak Legation in London.

asks the advice of the Council, it is informed of the decision reached by the majority, and also of the opinion of the minority. 'Unanimous decisions are marked as such. In decisions obtained by a majority of votes the opinions of the minority are expressly quoted and both the reasons of the majority and those of the minority are described in detail.'

The Council has done valuable work. The committees have been frequently consulted by the Government departments, and they have also made their own suggestions, which have often been well received in official circles. 'The Financial Committee in particular has been invaluable in giving expert advice and preparing the details of laws concerning taxation and the stabilization of the currency. Other committees have dealt with the housing problem, with a proposal for systematic electrification, and with many other questions of economic importance.

In Yugoslavia and in Poland constitutional provision has been made for the establishment of an Economic Council. The constitution of Yugoslavia contains a clause to the effect that 'for the framing of social and economic legislation an economic council is created. Its regulations, duties, and competence will be fixed by law.'¹

The constitution of Poland provides that 'a special statute will create, in addition to territorial self-government, economic self-government for the individual fields of economic life: namely, chambers of agriculture, commerce, industry, arts and crafts, hired labour, and others, united into a Supreme Economic Council of the Republic, the collaboration of which with State authorities, in directing economic life and in the field of legislative proposals, will be determined by statutes'.²

¹ Art. 44.

² Art. 68.

So far neither of these provisions has been carried into effect. It is doubtful whether an Economic Council could play a valuable part in countries the bulk of the population of which are engaged in agriculture, and it is not probable that such a Council could be established with any possibility of permanent or vigorous existence where the ground had not been prepared, as in Germany, by the spontaneous organization of the people in professional associations.

The results of the experiments that have been made in Germany and in Czechoslovakia lead to the conclusion that an Economic Council can act effectively only as an advisory assembly. The difficulties of composing the Assembly in Germany were enormous. In Czechoslovakia they were avoided only because the Government kept in its own hands the power of deciding the amount of representation to be given to each vocation. If such a body were entrusted with the right of ultimate decision in economic questions, the strife of interests would become irreconcilable, the difficulty of apportioning the number of representatives to different professions would be insurmountable. By whatever system votes were taken, by counting heads or by groups, the opinion of the minority would be overruled, the Council would lose much of its value as a body of experts. Moreover, the difficulties already experienced in differentiating between purely political and social or economic questions would be greatly enhanced. It therefore becomes apparent that the value of such a body would be diminished rather than augmented by any increase of its independent power. If the Government is continually to consult the Council, to co-operate with it and to have real confidence in its recommendations, it is of the utmost importance that it should not be looked upon in any sense as a rival of the Government or of the political Parlia-

ment. For this reason it is probable that a Council organized on the lines of the German Provisional Council or the Czechoslovak Advisory Council might do more useful work than the more independent body provided for in the German Constitution. As an advisory assembly a Council of this kind has the great advantage that it is able to put before the Government both the objective opinion of experts and the particular desires of the interested parties. Moreover, it brings representatives of the conflicting interests of various classes and vocations into direct contact with one another. It is hoped that this contact will influence them, and through them the groups which they represent, and make them realize that their own interest is inseparably connected with the general economic welfare of the whole community. It does not, however, follow that the recommendations of such a body will necessarily have more real value than those produced by the English system of appointing special commissions, in which the interested parties appear as witnesses before a body of impartial experts.

In practice the German Economic Council has not fulfilled the expectations of its supporters. There is not the slightest indication that influence is passing from the political to the economic Parliament. The Council is even looked upon as an expensive luxury. It has done some useful work, but it has not taken the lead in solving the most important social, economic, and financial problems of the post-war period. The Government, in dealing with such questions, invariably consults the appropriate experts, but it consults them as bankers, as industrial magnates, or as trade union leaders, and not as representatives of the Council, although they may incidentally be members of it. The advice of these specially chosen experts has more real influence than the recom-

mendations of the Council in its corporate capacity. They would be consulted even if the Council did not exist.

Nevertheless, the establishment of the Council and the readiness with which the idea has been accepted in other countries is not without importance. It is an indication of the extent to which modern Governments feel themselves bound to co-operate with non-official experts and with the representatives of organized interests. In itself neither of these tendencies is particularly democratic; the one implies government by an aristocracy of highly specialized knowledge and intelligence; the other involves favoured treatment for particular classes or professions that have formed separate associations within the general body of the State. The only possibility of reconciling influences of this kind with democratic government is to bring them into the open and into contact with each other, and to establish a regular elected authority through which they may act. Moreover, in spite of the increasing extent to which Governments have been compelled to interfere in economic and industrial questions, the fact remains that the initiative in such matters is still taken by the interested parties in their private capacity. Decisions affecting matters of vital importance to the community are habitually made without the participation of the Government. There is a real danger that political institutions may become divorced from the active life of the community, and as a result of this lose their hold on the interest of the people and fail to attract men of energy and ability. This can be avoided only by bridging the gulf between the political and the economic life of the nation. The establishment of the Economic Council in Germany is therefore worthy of attention. It is a first attempt to solve some of the most vital and difficult problems with which all modern Governments are faced.

APPENDIX A

SINCE Chapter VII was written a new Electoral Law has been introduced in Estonia.¹ The supporters of this Law sought to minimize the evil effects of proportional representation by stifling small groups, and yet to frame their measure in such a way that it could masquerade as a proportional system and therefore be adopted without a constitutional amendment. According to the Law of 18th February, 1926, all parties are eliminated in the first scrutiny unless they have enough votes to obtain at least two seats. If a party has not two members or more it cannot be represented at all. The effect of the new Law was immediately felt. At the elections of May 1926 only fourteen parties competed, although on previous occasions there had been as many as twenty or thirty in the field. Many parties who had no hope of obtaining the return of two members withdrew their candidates or combined with other parties. Even so, four parties remained who obtained enough votes for one, but not for two seats. These parties were held liable to forfeit the electoral deposit, a considerable sum. They brought the matter before the State Court, maintaining that the new Electoral Law was invalid and unconstitutional, as it infringed the principles of proportional representation. The Court, in giving judgement, declared that the complaint should have been made before and not after the elections, and, moreover, affirmed that the Law did not run counter to the clause of the constitution which provides for proportional representation.

Nevertheless, the objections of the opponents of the Law

¹ Braunius, 'Die Wahlreform der Jahre 1925-6', *Zeitschrift für öffentliches Recht*, 1927, Band XVII, Heft 1, pp. 27-47.

were well founded. If once the principle of limitation is accepted and a minimum is fixed, there is no inherent reason why this minimum should not be raised to an unlimited extent. The view that the sole object of proportional representation is to obtain an accurate reflection of the will of the nation has been rejected; it has been admitted that there should be a definite connexion between the electoral system and the needs of government. Once so much has been conceded, the objections to the majority system disappear. Majority voting in single member constituencies has the advantage of great simplicity; it makes artificial limitation of this kind impossible; and it does not probably entail more actual injustice than many elaborately thought out systems of proportional representation. Too much emphasis has been laid on the supposed necessity of giving special representation to every group or interest; a group or interest which is not separately represented does not therefore become inarticulate or lose political influence.

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